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POLITICAL SCIENCE QUARTERLY.

DO TRADE UNIONS LIMIT OUTPUT?

"EVERY trade union I know limits output and I'm against that and therefore have been against the unions," said Mr. Schwab, the president of the United States Steel Corporation, at a recent conference on industrial conciliation.[1] The answer to this charge by trade-union leaders was in part a denial, in part a vindication and in part a defiance; but neither side has attempted to make an analysis of the accusation and a reasoned exposition of trade-union policy on the subject.

What does limitation of output mean? To the casual newspaper reader the charge dimly conveys the idea that the trade unions encourage the policy of skulk or "go canny"; that the workman, under pressure from his leaders, tries to cheat his employer by slyly reducing the normal amount of the day's work. In this form the accusation is without foundation. Even in England, where the unions are most vociferously accused of destroying trade by limiting output, only one case of the recommendation of such a policy has been discovered by the thorough historians of the union movement, Mr. and Mrs. Sidney Webb; and in this unique case the policy was initiated by middle-class men, sympathizers with the workmen's movement, who were shortly afterwards excluded from the Trade Union Congress. Their recommendation ran thus:

[1] Conference of National Civic Federation, Rooms of Board of Trade and Transportation, New York, December, 1901.

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There is no ground for doubting that the real relation of the employer to the workman is simply this — to secure the largest amount of the best kind of work for the smallest wages; and, undesirable as this relation may be to the workman, there is no escape from it except to adopt the situation and apply to it the common sense commercial rule which provides a commodity in accordance with the price. . . . The employer insists upon fixing the amount he will give for an hour's labour without the slightest consideration for the labourer; there is, therefore, surely nothing wrong in the labourer, on the other hand, fixing the amount and the quality of the labour he will give in an hour for the price fixed by the employer. If employers of labour or purchasers of goods refuse to pay for the genuine article, they must be content with shoddy and veneer. This is their own orthodox doctrine which they urge us to study.[1]

Though the publication of such advice in the official organ of the Liverpool dock laborers — the men concerned — may be considered as an irregular notice of intention served on the masters, there was of course no agreement entered into with the masters, and so far as the advice was acted upon it would be against the spirit of the understanding by which a man engages to give a customary day's work for a customary day's pay. On the competitive theory that every man is justified in getting the highest price for his goods and in giving the poorest quality the customer will take, these dock laborers were no more to be blamed than merchants who sell shoddy articles. But responsible trade-union officials immediately recognized that the departure advised would, in the long run, be against the workman's interests; and in 1896, when the suggestion was made that a similar policy should be adopted by the International Federation of Ship, Dock and River Workers, it was opposed by the leaders and rejected by the vote of the members.[2] In all the recent newspaper controversy on the subject in London no facts have been adduced that indicate any change of policy in later years by the unions.

Reduction of effort by agreement with the masters is slightly more common. This is a method of raising wages. The main

[1] Webb, Industrial Democracy, I, 307.
[2] Industrial Democracy, I, 309, footnote.

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purpose of the trade union is to establish a standard rate of pay for a standard amount of exertion. If, then, while wages remain the same, the day's work is reduced, the effect, from the workman's point of view, is similar to an increase of wages. So long as the average output is kept at the amount which a man can give without overstraining himself, the limitation is wise and essential. But some local unions have for short periods, when they were exceptionally strong and badly officered, reduced the day's work below all reasonable limits, the masters giving consent only under compulsion. In Chicago, before the lockout of 1900, the lathers limited their day's work to twenty-five bundles and were paid three dollars, whilst formerly they handled thirty-five bundles a day for one dollar and seventy-five cents. The gas fitters, steam fitters, plasterers and plumbers in the same city had reduced their exertion in a similar way.[1] The plumbers had a specially low standard of exertion, their day's work being only sufficient to keep a man busy for half or two-thirds of a day. In London the members of the bricklayers union, it is alleged, now lay only five hundred bricks in a day of nine hours, while in New York a thousand in a day of eight hours is the minimum.

These very occasional shortsighted efforts to make the work go round among a larger number of men are condemned by the national leaders of unionism and receive no support from the immense majority of the rank and file, who recognize that the policy of systematic loitering has a bad effect on the men's character and that in the interests of society such adulteration of labor cannot be permitted. Irregularity of employment, with the shiftlessness it induces, is a great enemy of unionism, and habitual laziness while at work undermines the character in the same way. The masses of the laboring men realize also that, since in the long run their wages depend partly upon the gross national output, the policy of idling will have a boomerang effect and ultimately knock down wages. When, therefore, an American manager, Mr. Stewart, went to Manchester, England,

[1] See Bogart, "Chicago Building Trades Dispute," POLITICAL SCIENCE QUARTERLY, XVI, 135 (March, 1901).

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to superintend the erection of the Westinghouse Company's marvellous works, he was able to raise the English workman's output to the American standard, while, as he says, arriving at "an excellent understanding, which has lasted between employers and employed." He raised the wages ten per cent above the union rate (a hint which the complaining London builders might take); he had a series of plain talks with the union leaders; and he set competent foremen to arrange and superintend the work. Then, by the continuous elimination of lazy workmen (which is quite in harmony with trade-union rules so long as the new men taken on are unionists), he was easily able to raise the average output till it doubled and trebled the alleged London standard.[1]

In such exceptional cases as those at London and Chicago which I have quoted, the Nemesis overtakes the workmen before long. In Chicago they lost in the disastrous conflict of 1900–1901, and now their agreements with the associations of employers explicitly forbid any limitation of output.[2] In London, as John Burns, the greatest English labor leader, recently pointed out, the bricklayers are already feeling the result of their folly in the check to building operations and consequent unemployment. The drain on their funds for out-of-work benefits will reduce their power of resistance and, should the masters be able to show that the men could reasonably increase the day's output, the union will be unable to refuse.

One form of limitation, however, is an essential part of trade-union policy, enforced whenever the union is strong enough, and necessary to the union's existence. That form is the resistance to overdriving. When the employers are unchecked by trade-union combination they are driven by competition among themselves to set a working pace which often uses up the life energy of the work-people at a brutal rate. Humane employers are helpless to resist the pressure;

[1] From interview published in the London *Daily Mail* (January, 1902).

[2] See articles on "The Building Trades Conflict in Chicago" in the *Journal of Political Economy* (June, 1900) and POLITICAL SCIENCE QUARTERLY (March and June, 1901)

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the exertion extorted from their employees by the least humane masters, no matter how savage it may be, must be extracted also by the most considerate or they will be left without business.

The relentlessness of this tendency, when unchecked, has been frequently illustrated in the course of the investigation by the Industrial Commission. Overalls are made, as a rule, in large factories by girls who receive fair wages, but the speed at which the work is carried on is so exacting that a girl cannot endure the strain more than six or seven years. By that time her vitality is exhausted and she must leave her work in order to recuperate, either in some lighter occupation or in the hospital. In Chicago the manufacture of ready-made clothing for children is almost exclusively in the hands of Polish girls, who are hurried all the time by an ingenious system of "work records" by which the number of pieces completed by each girl is recorded at the end of each hour during the day. The girls begin work at one dollar and fifty cents a week, and wages are fixed, not by any scale for the shop, but by individual bargains with each employee on the basis of the amount of work done. Under such circumstances it can be seen that this continual comparison of records is superior to piecework in its power of urging the girls to their utmost exertion. Constant oversight and prodding, such as other nationalities would resent, have in ten years doubled the amount of work each girl must do in a day.[1]

In New York, under the "task system," which prevails exclusively in the Jewish tailoring shops of that city, the hours and the speed for edge basters and finishers have been continually increased until the women and girls, physically unable to bear the strain, have been driven out of the trade.[2]

The president of the Amalgamated Association of Iron and Tin Workers testifies that the foreigners who hope to return to

[1] Report of the Industrial Commission, vol. xv, part ii; E. Dana Durand, Special Report on General Statistics of Immigration and Foreign-Born Population, 331.

[2] *Ibid.*, 346.

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their own country will work for a few years at an exhausting speed which an American workman who must remain at the occupation cannot practice. In the case of thirty-gauge standard sheet, for example, the output for a day was formerly fixed by agreement at 2600 to 2900 pounds; in 1895 it was raised to 5250 and later to 5750 pounds by agreement. Individual foreigners, however, have made as high as 7500 pounds, with the excuse: "We are going to make our pile while we are here, and then we'll go back to the old country again."[1] Americans, whose "old country" will object to supporting them if they break down in middle life, are accused of limiting the output because they refuse to copy this break-neck speed.

The "minute" system of certain firms of watch engravers illustrates the ingenuity with which workmen, unprotected by unions, are driven to increase the output at the expense of health and wages. Under this system the engravers are rated at, say, eighteen dollars a week — a mockery which is very exasperating to honest-minded men. For this wage they must turn out for six hundred minutes a day for six days whatever quantity of work the firm imposes. The foreman will give the engraver a watch case to be finished in, say, sixty minutes. When there is no union the foreman alone sets the time, and the men declare that it is physically impossible to do the work even in a most slipshod manner in the time he allows. But if sixty minutes are set, only sixty minutes will be paid for, though three hundred minutes may be actually taken. The result of the pace thus enforced is as destructive of skill as it is of health.[2]

Mr. Charles J. Bushnell, in the *American Journal of Sociology*,[3] reports that the extreme strain of the work in the Chicago stock yards is destructive to the vigor of the men. This strain is brought about by a process called "speeding up the gang." Most of the materials in process of production are

[1] Durand, *op. cit.*, 425.
[2] *American Federationist* (April, 1901), 134.
[3] Article on "The Chicago Stock Yards" (January, 1902), 439.

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attached upon trolleys or other machinery which keeps them in motion and requires each man to handle his part as it passes.

By the employment of certain experienced and especially favored hands to set the pace, by the offer of shorter days of labor at approximately the same wages, and then later a reduction of the wages to correspond with the resulting reduction in time, the amount of work finally wrenched from the workmen is sometimes almost incredible as well as inhuman.

In many occupations the widened use of machinery makes such hurrying of the pace very easy to the unscrupulous employer if the individual workman is left to his unsupported efforts to defend himself. Any one who has seen a cotton factory, for instance, must easily realize this. The spinner tends a certain number of spindles; but the speed at which they turn and the rate at which the loom runs are not under his regulation. Let the engine be driven a little faster and every movement of the loom is quickened; more cotton is spun, and more threads break every minute; the human spinner, bound to the untiring and inexorable machine, must then run about faster, keep his nerves at tighter tension and drain away his life's energy at a higher rate.

In limiting the output by resisting such a reckless consumption of human life as these examples illustrate, the trade unions are not only acting in self-defense but they are helping to preserve the national standard of strength. An industry which uses up the vital energy of a worker in a few years is coining the nation's lifeblood into dividends. No industry has a right to more than that amount of the worker's energy which can normally be replaced by the food and rest allowed to him. Workers worn out at an early age by too great exertion must be maintained in some way by society; either their friends or relatives subsidize them, or they become chargeable to some public or private charity. Therefore, the overdriving occupation is a parasite existing in part upon the workers in other occupations. It pays for only a part of the human power it uses up; the other part is paid for later by the workers who are maintained in other callings. Such parasitism is worse in

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industries than it is in individuals; for its devastations, though better hidden, are more widespread. Limitation of output, by the prevention of overdriving, then, is not a crime but a virtue.

Included in the accusation that trade unions limit output is the implication that, by resisting the introduction of machinery, they tend to cripple industry and show a shortsighted stupidity in regard to their own interests.

A fair examination of this charge and of the new policy of unionism towards machinery requires first an understanding of the effect which machinery has on wages and employment. Ultimately, no doubt, it increases employment and, by cheapening production, makes a wider diffusion of comfort possible. But its immediate effect is almost always prejudicial to the workman, by destroying the value of the skill he has spent an apprenticeship in acquiring, by reducing the demand for workpeople in the shops where the machinery is introduced, and often by inviting the substitution of women and children for adult men in doing what manual work remains.

By the substitution of machinery for hand work in coal mining the cost of getting a ton of coal to the pit's mouth is greatly reduced. This is an undoubted gain to society, which thereby got its furnaces supplied on the average for nineteen cents a ton less in 1899 than it paid in 1886.[1] But how did this improvement affect the miner? Did richer production bring him better conditions? When he got out more coal did he get higher wages? On the contrary, the Illinois bureau of labor statistics has shown that in Lasalle County the average earnings per day in the hand mines are from two dollars and thirty-seven cents to three dollars and in the machine mines only one dollar and ninety-seven cents.[2] This would be bad enough if it were all. But to make the loss to the men still heavier, the proportion of skilled men who were receiving these wages was reduced from over seventy per cent in the hand mines to less than ten per cent in the machine mines. This degradation of the miner's condition at the moment his work becomes more productive is,

[1] Parker, 1899, 42; quoted by Durand, *op. cit.*, 399.
[2] Illinois Bureau of Labor Statistics (1890), 101, 113.

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however, not universal. In other districts, where he has been better organized, a higher scale has at any rate been secured for such miners as are retained at skilled work in machine mines. In the words of the Industrial Commission: "The miner is able to gain from the introduction of machinery, provided he is able to organize, but without organization he does not gain."[1] Indeed he then loses both by the loss of skilled work and the reduction of wages.

The number of inventions and labor-saving appliances introduced, and the wide range of their adoption, is the main characteristic of the textile trades. As a result the weavers have doubled their capacity and output in thirty years, and yet those who earned twelve or thirteen dollars a week in 1872 can now earn only eight to ten dollars a week.[2] As a foreman of a weaving shop in Fall River says: "Not only have wages decreased in proportion to the amount of work done, but they have decreased absolutely."[3] In this trade, also, what are improvements for the community as a whole bring degradation and loss of employment to the skilled workmen. For example, the "ring" spindles recently perfected are now replacing "mule" spindles. The mule spinner is a mechanic who takes years to learn his trade and, by hard work, can earn from twelve to fourteen dollars a week. But the ring spindle can be tended by a woman after a week or two of practice; she does not have to work as hard as the male mule spinner, and her wages are only half as much as her displaced brother's were.[4]

The quarter million of employees in the shoe factories of the country attribute the reduction of their wages to the introduction and perfection of machinery which has caused the minute subdivision of labor, the employment of unskilled workers, the destruction of old trades and unions and the consequent unchecked competition among employers for the extraction of the maximum of energy for the minimum of pay. These changes have enabled the manufacturers to put cheap shoes on the feet of Englishmen, Australians and South

[1] Durand, *op. cit.*, 405.
[2] *Ibid.*, 420.
[3] *Ibid.*, 420.
[4] *Ibid.*, 420.

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Americans; but the changes have compelled our own workpeople to make two pairs serve where they wore three before.

In the wood-working trades of the Northwest marvellous, deft machines make it possible for boys and girls to do glazing and women to do carpenter work; but in consequence the men, in some cases, were recently getting only fifty cents a day and were thus paying by their degradation for the cheap doors and windows in eastern and foreign cities.[1]

Men working by hand at the blowing of glass fruit jars formerly earned seven dollars and fifty cents a day. But a clever machine was invented that enables two men to produce twelve times as many as three men did before. Has this increased productivity bettered the state of the men? Not at all. Besides the dislocation of their trade and the reduction of employment, they have suffered a reduction of wages to five dollars a day.[2]

Illustrations might be multiplied, but these are enough to show why both unionists and non-unionists have had the same instinctive dislike toward the introduction of machines that small shopkeepers have felt toward the establishment of department stores, and commercial travellers toward the organization of trusts. The complex mechanism, almost gifted with intelligence, which excites our amazed admiration is to the workman a veritable Frankenstein, beyond his control, destructive of his livelihood and hungry for his children. It is not surprising, then, that he has often resisted it by the dead weight of his passive opposition, and that he has occasionally tried actively to suppress it, as when the flint-glass workers, copying the methods of some trusts, proposed to the manufacturers that a machine for blowing glass chimneys be bought up and eliminated and that the selling price of chimneys be increased to pay the cost.[3]

Still more, then, is it to the credit of the intelligence of the labor leaders that they have seen that the onward march of

[1] Durand, *op. cit.*, 423. [2] *Ibid.*, 426.

[3] Summary of Report on Trade and Labor Organizations, prepared under direction of Industrial Commission, ix.

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machinery is as inevitable as the coming of the spring rains. They recognize that the best policy for the unions is to welcome mechanical improvement and by solid organization and collective bargaining to secure for their members a share of the abundant harvest that it brings. Therefore, the American Federation of Labor refused the request of the coopers to boycott ale and beer packages made by machinery; the president of the glass blowers, at their convention in 1900, recommended the members to make no effort to oppose the introduction of machines; the iron moulders have formally removed from their constitution the articles which were hostile to machinery; and the leader of the lithographers in New York told the masters to go ahead with the introduction of aluminium plates — that the objection of some of the workmen would be overruled. In England the cotton spinners by their wage schedules make it necessary for the masters to use the newest inventions, and old firms actually complain of "trade-union tyranny" which will not allow them to jog along in the traditional family ruts.[1]

But while the unions encourage the increase of output that improved machinery brings, they wisely insist that they shall not be victimized unduly for society's good. "If there is an economic advantage in the use of the machines," they say, "let employers and customers be satisfied with that, and don't try in addition to drive down our wages. Surely trade does not require and certainly justice does not sanction that just at the time when our work is made more productive our living shall be made more meagre. On the contrary, may we not reasonably claim a share of the increased product, that our families may directly experience the benefits which you tell us machinery brings?"

This policy has been carried out effectively by the printers, both in New York City and in London. When the typesetting machines were introduced the unions promptly accepted them as inevitable and only insisted that they should be worked by members of the union, who should be allowed a reasonable time to learn to use them without any reduction of pay, and that

[1] Webb, Industrial Democracy, I, 413.

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a scale of wages should be fixed for them that should enable the men to earn as much as the hand compositors. Had they refused to work the new invention, they would probably have been displaced by non-union men, wages would have been lowered both for hand and linotype composing, and the union would have been demoralized. As it is, the unions are stronger than ever, and wages have gradually been raised while the cost of printing is reduced. Thus consumer, employer and workmen all gain.

At the best, and even in this favorable case, the union suffers during the period of transition by having a number of its members thrown out of work. In a well-organized society these men would be placed elsewhere to work or would be maintained by the community for whom the improvement is made. But at present either the union must maintain its out-of-work members or they must suffer a period of semi-starvation till industry has been readjusted and they have found the new niche which they can fill. Typographical Union No. 6, in New York, to tide over the bad times, bought a farm in New Jersey, where it sent its unemployed members to earn a partial living on the land and reduce the drain on its own funds. Does not that suggest the remedy which the nation might adopt? Too often, at present, we virtually ask the workman to lay down his life for the community in the name of Increased Output, the industrial god. A displaced man and his family cannot wait in idleness five or ten years for the benefit of an improvement to work round to them. Left to themselves, they may be starved or in the poorhouse before they are reached by the widened wave of employment started by the lowered prices of machine-made goods. But when they are guaranteed against the bitterness of poverty in the interregnum, they will become as enthusiastic as the trust magnate for the best machinery and unlimited output.

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CARTELS AND TRUSTS IN HOLLAND IN THE SEVENTEENTH CENTURY.

THE cartel, or producers' syndicate, seems at first sight to be of recent origin. Economists generally assume that "trade agreements" are a consequence of the "multiplication of products" and the "reciprocal invasion of markets" that characterize our present epoch, and hence no one has as yet turned to history to examine certain forms of such agreements which are clearly defined and relatively ancient. As to trusts, they are believed to be the final result of the "concentration of capital"; and just as the term has only recently found its way into current speech, so it is assumed that the phenomenon itself dates only from yesterday.

Yet, how is it possible for one to believe that such agreements, such combinations, have not been known and practiced since time out of mind? An active competition among producers and among traders is nothing novel. Long before the nineteenth century those whose interests were at stake must have planned to limit the effects of their mutual rivalry, either by alliances with one another, in which each retained his individuality and in part his independence, or by complete and definite combinations.

We need not go back to Greek and Roman antiquity for evidence of such conditions. It would be useless to seek proof for our statement in a society so different from our own, especially since it would be necessary to slur over a period of great uncertainty in order to connect the remote past with the present. But of the time in which comparison becomes intelligible and possible the first half of the seventeenth century naturally attracts our attention, since in the more liberal and advanced countries of Europe it opens the modern era.[1]

[1] The sixteenth century affords examples of rudimentary cartels under the name of "monopolies." "The butchers form monopolies," said Josse de Dammhoudère,

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For this period we have two valuable collections of sources in the *Records of the Company of the North*, compiled by the somewhat dull but conscientious editor, M. S. Muller,[1] and the documents and studies on the same subject by a young and brilliant historian, M. G. W. Kernkamp.[2] There are available, moreover, the texts published in the great work of Lieuwe van Aitzema[3] and in the *Groot Placcaetboeck*. Out of the various industries[4] involved, I have chosen for consideration in this paper the fisheries at Spitzbergen and at Jan Mayen Island, and the traffic in oil in the Dutch Netherlands.

I.

The great trading companies which were founded in the Dutch Netherlands at the beginning of the seventeenth century arose chiefly from the necessity of association for the carrying on of a common enterprise. In regard to the trade with the East Indies, it has been said that in 1602 "without a general company, voyages so long and distant as those to the extreme Orient could not have been profitably carried on."[5] It was for this reason that the existing small companies were replaced by a single powerful one. This consolidation was, to a certain degree, analogous to our "trusts";[6] nevertheless, it

"which by means of common funds purchase butchers' cattle from all sides, keep them in their establishments, and bring them to slaughter only in certain quantities, according to size or number, in order that they may resell at a higher price, here and there, to one and another." — Pratique judiciaire ès causes criminelles, Anvers, 1564, p. 170. *Cf.* my series of articles in the *Journal des Économistes* on "Speculation in the Low Countries in the Sixteenth Century," III, "Engrossing."

[1] Geschiedenis der Noordsche Compagnie, Utrecht, 1874. *Cf.* also the *Social Weekblad* of January 9 and 16, 1897.

[2] Stukken over de Noordsche Compagnie, overgedrukt mit Bijdragen en Mededeelingen van het Historisch Genootschap, XIX, 263 *et seq.*

[3] Saken van Staet en Oorlogh (The Hague, 1669), II, 356 *et seq.*

[4] The organization and activities of the English "regulated companies" at an epoch somewhat earlier than this would furnish material for an interesting parallel study.

[5] O. van Rees, Geschiedenis der Staatshuishoudkunde in Nederland (Utrecht, 1868), II, 385.

[6] M. Muller sees in this a cartel (*Social Weekblad*, January 16, 1897); but he is mistaken. It cannot be considered a cartel, since the original companies formed a single company in which all the partners had identical interests.

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differed greatly from the trust, since the interests of the country as a whole were at stake, not those of a narrow group of citizens. Every one could profit by the opportunity to take part in the common enterprise, and not the former partners alone. The case of the West India Company was similar. The organizers wished first of all "to cut the enemy to pieces"; in the second place, "to enrich the country."[1] It was necessary for them to concentrate all the forces of the nation in order to attain this end, in which patriotism was combined with business. Accordingly, an appeal was made to the good will of all.

The Company of the North, which is of especial interest here, was at first in the same position. "The English were seeking to prevent the voyage," and it was necessary that common action should be taken in order to offer energetic resistance to so dangerous a policy. In 1613 the English association known as the Muscovite Company decided to send to Spitzbergen seven ships in order to prevent by force all foreign competition; it desired to monopolize the fisheries in this distant region. It attacked the vessels belonging to the traders of Amsterdam, of Zaandam and of Enkhuizen — sank some and captured others. Only a solitary Zaandam bark was able to escape and to report the sad and alarming news.[2]

A concentration of energies was thus rendered necessary. The two companies which existed at Amsterdam united and planned either an early fusion with the company of Zaandam or the purchase of its vessels. On January 27, 1614, a petition was presented to the States-General, demanding a concession for a "general company." The legislature promptly granted the petition, recognizing that it afforded the best means for repairing the loss endured and for preserving this industry, which otherwise would have been placed in jeopardy and would have disappeared in the confusion.[3] Thus with the desire of revenge upon the English ships was combined that of assuring a better fishing trade.[4]

[1] Van Rees, *op. cit.*, p. 74.
[2] Muller, *op. cit.*, p. 74 *et seq.*
[3] Groot Placcaetboeck, I, 669.
[4] Van Rees, *op. cit.*, p. 175.

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The concession was granted for two years. All who wished to join the company had the right to do so; they had merely to declare their intentions in the six weeks following the posting of the advertisement.[1] Hence the company was not a monopoly.[2] Though the official documents give us no information with regard to this company, which was not regulated by the legislature, as were the two India companies, nevertheless, it is quite certain that we have to do, not with an imperfect trust, but with a cartel, sufficiently clear in its origin and progressively clearer in its evolution.

The Company of the North was not, strictly speaking, a single company, but a number of companies, established in the principal centers of the country and connected with each other by a contract according to which matters of common interest were submitted to the deliberations of a general assembly. The company was divided into several "chambers." Each chamber had its own capital,[3] controlled its own vessels and appointed the directors of its enterprises. It was frequently proposed to carry on the business "for common account," "with common funds,"[4] but the opposition of the more fortunate chambers, especially that of Amsterdam, was always an obstacle to such a policy, which would have created a real "trust."

General assemblies existed from the first. Each chamber had a certain number of votes, according to its importance. The resolutions of the general assembly, "being designed to avoid all confusion and to defend[5] the members against the power of foreign nations," were binding upon all. In case a dispute arose, it was without doubt referred to the States-General.[6]

Some time before the departure of an expedition for the northern regions, the parties interested decided how much

[1] Groot Placcaetboeck, I, 669.

[2] Muller, *op. cit.*, p. 76.

[3] In his enumeration, M. Muller confuses all the historical epochs. On this point (*op. cit.*, p. 83) he cites relatively late documents only. Nevertheless, the capital of the company must undoubtedly from the first have been divided among the various chambers; for in 1617 mention is made of "the participation of each in the company, *under the respective chambers*" (G. W. Kernkamp, *op. cit.*, p. 323).

[4] Muller, *op. cit.*, p. 84.

[5] *Ibid.*, p. 86.

[6] Groot Placcaetboeck, I, 673.

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each should furnish in the way of vessels, sailors and harpooners. The contingents of the various chambers met on a fixed date. Voyages were usually made under escort, in order to oppose a more energetic resistance to foreign companies and to pirates. When the fishing had been completed the product was divided among the chambers, according to a fixed proportion.[1] Each party returned to his own place of business and offered the oil for sale on terms expressing the existing state of the market.

It was not long before the union of the chambers grew closer. At first the deliberations of the general assemblies were concerned especially with the conditions of fishing. Gradually two new subjects for consideration appeared: control of supply — "so much oil was not to be imported that it could not be used"[2] — and the fixing of a minimum selling-price for all.[3] In 1618 the chamber of Amsterdam announced to the chamber of Enkhuizen "that it was disposed to send out small expeditions" in order to diminish the catch. From that time it is easy to perceive a feeling which afterwards became of increasing importance, and was soon to find very clear expression:

> The greater the catch, the greater are the losses that must be borne. Has the fishing been bad, money is lost. Has the fishing been good, the expense is increased and the price depressed because of the abundance. In either case, there is a deficit: *it is necessary to limit the catch and to try to secure a sufficiency at a low cost; but not more than will be demanded.*[4]

An understanding as to the selling-price does not appear to have existed in 1617.[5] But there is a passage which permits us to suppose that an understanding existed the following year. "We consider that the chambers which have oil should come to an agreement with each other; *thus they will not violate their contract*, for those who have sold all of their own can suffer no damage."[6]

[1] Kernkamp, *op. cit.*, p. 271.
[2] *Ibid.*, p. 328.
[3] *Ibid.*, p. 271.
[4] Muller, *Social Weekblad*, January 9, 1897.
[5] Kernkamp, *op. cit.*, p. 271.
[6] *Ibid.*, p. 329.

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In 1622 the cartel resulted in a monopoly in favor of the former partners in the Company of the North. At the time of the first renewal of the privilege, in 1617, the chamber of Amsterdam had sent to that of Enkhuizen twenty-five copies of an advertisement, informing every one that he might take share in the enterprise.[1] Five years later "the States-General found it well to give a patent to the Company of Greenland, to the exclusion of all other citizens," for whale fishing.[2] The "Company of Greenland" was another name for the Company of the North, whose members thus secured a monopoly which they retained down to the fall of the organization.

It was not the fault of the Company of the North that its interests were not protected by measures directed against importations from abroad as well as by an exclusive privilege as against Dutch citizens. On several occasions, the company, annoyed by the competition of foreign oil, demanded that either the importation of oil and whalebone should be prohibited — as had been done in England in the case of the latter article — or heavy customs duties should be imposed (at least six florins per hundred weight of whalebone and eight florins per cask of oil),[3] leaving the oils of Russia alone to enter free of duty, since it was not desired to incur the risk of retaliation on the part of so valuable a customer.[4] "Thus the English would be unable to import more oil, for they could not sell except at rates that excluded profit"[5]; and the state would secure an important source of income for the treasury.

But the States-General turned a deaf ear to these demands for protection, fearing that the company would abuse its position and impose upon the consumers exorbitant prices.[6] In 1621 the company again vainly demanded an increase in the duties.[7] The Dutch legislators, more clear-sighted than those of modern times, thus prevented the combination from becoming absolute master of the national market.

[1] Kernkamp, *op. cit.*, p. 269; *cf.* Groot Placcaetboeck, I, 670.
[2] Groot Placcaetboeck, I, 675.
[3] Kernkamp, *op. cit.*, p. 324.
[4] Muller, *op. cit.*, p. 89.
[5] Kernkamp, *op. cit.*, p. 325.
[6] *Ibid.*, p. 275.
[7] *Ibid.*, p. 274.

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To summarize, the Company of the North, originally a very imperfect cartel, became a combination progressively closer with lapse of time. To agreements concerning more especially fishing and its conditions were soon attached other agreements, preventing overproduction, fixing prices and assuring an advantageous sale in foreign markets. This situation led to a *monopoly*, which lasted until the fisheries at Spitzbergen and the Jan Mayen Islands became free to all citizens of Holland. Finally, those who were interested in the company made several attempts to do away with all foreign competition and to fix prices according to their wish; but they met an energetic resistance on the part of the government, which was not at all duped by their seductive arguments.

II.

We shall now consider the cartels formed by the Company of the North with its more dangerous rivals; at first with the "small company," then with the traders of Zealand and finally with the Frisian traders.

In 1614 two ships belonging to the chambers of Amsterdam and Enkhuizen discovered the island Jan Mayen.[1] Upon their return to Holland, the Company of the North did not demand of the States-General an act supplementing the original concession so as to cover the new territory. The motives for this omission have remained somewhat obscure; but it appears that bad faith was not wholly absent. In the following year two directors of the company, "seeking rather their private gain than the general good," secretly and on private account sent to Jan Mayen a vessel which made a good catch there. Later, having severed connection with their former partners, they formed an association, which was known as the "small company," and expanded their operations. A complaint was addressed to the States-General by the Company of the North demanding the seizure of the vessels and their contents, the imposition of a fine on the owners and a more

[1] *Cf.* Kernkamp, *op. cit.*, pp. 276 *et seq.*; and Muller, *op. cit.*, pp. 311 *et seq.*

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extensive grant in its own favor. In 1616 a temporary agreement was made by the parties concerned in the business by which the products of the fisheries were to be distributed to each according to the profits of the vessels sent out.[1] After a great deal of hesitation, upon the promise given by the "small company" that by the sale of oil the market should not be spoiled for the Company of the North, the States-General finally decided (1617) that for four years "the two parties should have the right to fish at the two islands in question, with equal rights and without causing each other any annoyance."

The "small Company of the North," better known briefly as the "small company," was much like our modern syndicates. It was an association formed by merchants and commercial houses, designated in the documents by the characteristic term "consorts." The products of the fisheries were divided among the partners, who then disposed of them in trade. The rules of the company of 1622, of which we shall speak later, imply an inequality among the consorts, analogous to the inequalities among the chambers of the "great company."

During the four years in which the two companies were to enjoy in common the privilege of fishing at Jan Mayen Island, competition between them was not only unnecessary, but would have been positively detrimental. Hence, on May 25, 1620, an agreement was made fixing especially the conditions of fishing. A complete and definitive consolidation would seem to have been a natural consequence of this situation. But while a concession was demanded December 4, 1620, "in the name of the two companies," the principal shareholders of each company did not abandon the effort to secure an exclusive privilege; and up to 1622 a struggle, at times secret, at times overt, was kept up by the two companies.[2] At last, however, the cartel was formed. In 1621 complaint was made about the importation of foreign oil, "to the great prejudice of the good order in prices which the companies had established." This implies a perfectly definite agreement on this

[1] *Cf.* Muller, *op. cit.*, p. 317. [2] Muller, *op. cit.*, pp. 320 *et seq.*

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point.[1] And in 1620 we find an agreement for a joint sale; instead of competing on the market of Rouen, the partners and the consorts sent a cargo of oil and divided the profits of the operation.

The official report of a meeting of the representatives of the "great company" and the "small company," held at Amsterdam, March 22–25, 1621, would repay perusal.[2] Decisions were made concerning lawsuits and concerning the sending of ships to Mauritius; a statement was made of the quantities of oil sold since the last distribution; accounts were settled, and, in a word, all matters of common interest were there discussed and adjusted.[3]

At the time of the organization of the Company of the North, Zealand had found itself in complete disagreement with the other provinces. It had never accepted the idea of a "general company," and had held steadfastly to its own opinion. The concession had been granted without its support; and with the particularistic tendencies of the age, it had preserved its liberty. The Zealanders took advantage of this situation. In 1616 two vessels left the port of Vlissingen and directed their course toward the Arctic regions. The Company of the North protested in vain. But one of the ships of the Zealanders touched upon Jan Mayen Island and was captured; the Zealanders, it was said, might disregard the concession, but they should not infringe upon the rights derived from *discovery*. This claim turned out to be well founded.

When, in 1617, the question came up as to a renewal of the concession of the Company of the North, the government of Zealand desired strongly that nothing more than a "regulated company" should be established; the Hollanders, on the contrary, inclined toward a complete and definitive consolidation of the industry covering the whole country. The former party triumphed. January 24, 1617, the former concession was renewed; three days later it was ratified in Zealand, and

[1] Kernkamp, *op. cit.*, pp. 287–288. [2] *Ibid.*, pp. 336 *et seq.*
[3] Muller, *op. cit.*, pp. 223 *et seq.*

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finally, March 19, 1617, an understanding was arrived at between the traders of Zealand and the Company of the North. Let us summarize, article by article, this curious cartel:[1]

1. The chambers of Holland shall participate in the voyage to the extent of three-fourths of the undertaking; the province of Zealand to the extent of one-fourth.

2. In order to offer effective resistance to foreign nations, and in order to maintain prices, several general assemblies shall be held each year. In these shall be determined the number and the tonnage of the vessels to be sent out, as well as "all other necessary matters." During the first three years, Holland shall have four votes in the assembly and Zealand one; during the fourth year, Holland shall have three and Zealand two.

3. The assemblies shall be held, for the first three years, in Holland; the fourth year in Zealand.

4. The sessions shall be presided over by Hollanders the first three years; the fourth, by a Zealander.

5. The representatives shall, on a fixed day, appear at a place indicated by the president.

6. The president shall give notice in advance as to the place for meeting.

7. The decisions adopted shall be most strictly respected by all, under penalty of a fine to be determined in general assembly.

8. It is forbidden to reveal the resolutions and secrets of the companies, or to derive personal profit from them, under penalty of 100 guldens, and eventually, of suit for damages.

9. The directors of the companies shall not establish the industry of whale fishing outside of the United Provinces.

10. Dispositions relating to the choice of directors.

11. The oil and whalebone is not to be sent to a foreign port before having been brought into the United Provinces.

12. The operating stock shall be fixed each year by the general assembly.

13. Each vessel shall carry at least eight cannons.

14. The fleet shall be under the command of a general or a commander.

15. The losses resulting from an attack on the high seas shall be shared by all the partners according to the importance of their shares.

[1] Muller, *op. cit.*, p. 423.

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16. In order to avoid long discussions of final losses, each one shall submit, fourteen days after the departure of the fleet, an estimate of the goods which he has on board ship.

17. Every one shall have a right to visit all the vessels in order to prevent bad faith.

18. The various goods which are left near the coast, to be taken on board again in the following year, may not be taken possession of by any of the associates.

19. The discoveries of each shall be enjoyed by the rest.

20. The partners are to agree upon the fixing of wages on the ships.

21. Expenditures made in the common interest are to be distributed among all.

When the concession of the Company of the North expired in 1621, an agreement as to its renewal was at first impossible; ultimately, however, on December 20, 1622, the three companies united to demand the prolongation of the patent. Under the new arrangement the situation was not perceptibly modified; the distribution of products alone was changed. Although it cannot be said that the several cartels, grafted one upon another, constituted a single company, yet it may be said with certainty that the union between the several companies became closer.

Before the expiration of the concession, which took place in 1634,[1] Friesland announced to the States-General that it would refuse to ratify any prolongation of the patent. The precedent of Zealand easily explains and justifies this conduct. A Frisian company was soon formed, and it obtained from the provincial states a grant for twenty years. A public subscription was opened, and every one could invest whatever sum he desired. This procedure aroused violent antagonism. But since the right of the Frisians was generally recognized, there was nothing to do but to meet the evil fortune with good grace. A conference was held between representatives of the "great company" and the Frisian company, which resulted in an agreement quite analogous to that which we have described

[1] See especially Lieuwe van Aitzema, Saken van Staet en Oorlogh, II, 359 *et seq.*; and Muller, *op. cit.*, pp. 336 *et seq.*

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above. The Frisians were to have a right to three thousand casks of oil out of a total fixed at twenty-seven thousand (art. 2). Three general assemblies were to be held annually (art. 9). "The assemblies should determine the proportions and the quantity of product to be taken from the fisheries, the wages of the harpooners, the number of shallops, their equipment, the command on the high seas, as well as all other matters" (art. 10). Discoveries made by any company were to be to its exclusive profit for five years; afterwards were to be exploited by all the companies (arts. 19 and 20). Those who should violate these dispositions were subject to a severe penalty (art. 24).

Thus it was that upon the original cartel were grafted three principal cartels with rival companies, which had arisen successively within the country. The very clear opposition of interests renders the situation especially well marked and suggestive, and the existence of contracts fixing the rights and the duties of each party is of exceedingly great interest to us. An attempted agreement between the Dutch and the Danes furnishes an appropriate climax to the development.

Two years after the combination with the Frisians, Van Cracaw, chargé d'affaires of the Netherlands at Copenhagen, was requested, "with the pleasure and approbation of the Company of the North," to suggest to the Danish company the possibility of an agreement relative to the fisheries and the sale of products.[1] The two nations were operating in different fields with a certain number of vessels, and it was proposed that, to diminish the effects of competition, the foreign markets should be divided between them. The king received this offer very cordially; but it had come too late, for the Dutch company no longer possessed its former vigor, and the project went no further.

[1] *Cf.* Muller, *op. cit.*, p. 89.

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III.

Modern syndicates of producers do not differ at all from the complete cartels of the seventeenth century, such as that of the Company of the North with the Zealand traders. They are now, as they were then, agreements relative to production and selling-prices. The economic situation alone has changed; "products have multiplied," "markets have extended and consolidated" and, at the same time, "customs barriers have arisen." In such an environment cartels have naturally been destined to assume a great importance, and "trusts" — combinations inspired by the spirit of class — were certain to intensify the narrow "concentration of capital" of late years.

Socialists aim, perhaps, to prove that in the seventeenth century there was as yet no "overproduction." This is a mistake, for it was then a menace in consequence of the narrowness of the markets; the citations given leave no doubt on this point. But the socialists would make a mistake if they were disturbed by this observation, for the phenomenon is indeed an expression of "modern capitalism"; it first appeared in the seventeenth century in the most liberal countries of Europe, developing without great vigor in the eighteenth century, and finding its clearest expression in the marvellous age of inventions and of industry which began about the middle of the nineteenth century and continues in the present day.

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PARIS, FRANCE.

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THE PAST AND THE FUTURE OF THE INTERSTATE COMMERCE COMMISSION.

I. *Leading Principles of the Decisions of the Commission.*

THE decisions of the Interstate Commerce Commission, handed down since its organization in 1887, now number 1290, some of which cover two or more cases decided at the same time. The facts presented in this long series of cases are kaleidoscopic. A single fact may appear a hundred times, but it always comes again in different company. Never, perhaps, does exactly the same group of facts reappear in exactly the same combination or relationship. Hence each group of facts embraced in a case and each decision based upon the same has an individuality of its own. Generally speaking, no two cases are alike in every respect, and no rule of thumb can be devised by which a decision can be rendered. Yet, though each decision has its peculiar characteristics, an analysis and comparison of many cases and decisions reveals certain common elements or underlying principles and views. To point out these common elements, views and principles in the decisions of the Interstate Commerce Commision is the chief aim of this discussion.

The problems involved in the decisions are primarily economic, although political and social considerations are not wanting. As a compilation of economic facts alone, tested and certified, the decisions constitute a valuable contribution to industrial history. To know the world as it actually exists should be a leading task of every man. The Interstate Commerce Commission has placed at the disposal of the public the most varied, the most widely distributed, the most concrete and the best authenticated collection of facts relating to railways in the United States that is available at the present time; and by means of these facts we may learn something of the

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difficulties involved in railway transportation in this country. By far the greatest number of facts relate to the problems of competition, which in turn involve questions of similarity and dissimilarity of conditions, long and short hauls, coöperation, reasonableness of rates and discriminations. Closely allied to these questions are those relating to classification and commodity rates. Standing somewhat by themselves, and yet not disconnected, are decisions relating to through shipments, foreign trade, routing of freight, *etc.* Questions relating to the enforcement of the Act to Regulate Commerce and to the giving of testimony make their appearance. The interpretation of the act is frequently drawn into consideration, but this feature of the decisions of the commission can best be associated with the court decisions called forth by the same.* All of these topics have numerous subdivisions and ramifications which cross and recross one another in the complex network of relationships which the railway as an institution represents, and which is the ultimate cause of the kaleidoscopic nature of the cases brought before the commission.

Competition and the Long and Short Haul. — The Act to Regulate Commerce assumes that railway transportation is a competitive industry and that competition among carriers should be preserved. The Interstate Commerce Commission has repeatedly asserted this in its annual reports and decisions.[1] A score of decisions relate primarily to water competition in its bearing upon the long and short haul clause. The commission has held that the act permits railways to meet but not to extinguish the competition of water carriers.[2] The cheapening and regulating functions of water competition have been generally recognized ;[3] but in the case of very low rates on steel products

* It should constantly be borne in mind that in the first part of this paper only the decisions of the commission are considered, *irrespective of the decisions of the courts.*

[1] For instance, Annual Report (1887), pp. 37, 40; Annual Report (1898), p. 20; Decisions, **1**, I. C. C., 319; **2**, 52; **4**, 131.

[2] **7**, 224. Hereafter, for the sake of brevity, the decisions will be cited by volume and page numbers only, the former in bold-faced type.

[3] Cullom Committee Report (1886); Johnson, Inland Waterways, 61 ; Hadley, Railroad Transportation, 93–98 and elsewhere.

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to San Francisco from the Atlantic and Mississippi valley points, compared with the rates on the same products from Pueblo, the commission held that water competition is altogether inadequate to account for the general relatively low rating of lumber, grain and other staple or heavy goods to or between inland points.[4]

The existence of water competition and of competition among railways has been the ground upon which railways have commonly petitioned the commission for relief under section iv of the act. As is generally known, this is the long and short haul section, which makes it unlawful for a railway company

> to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.

Obviously the decisions on long and short haul questions turn upon the similarity or dissimilarity of the conditions under which the hauls are made. The commission has uniformly held, from the first, that carriers must judge in the first instance as to the similarity or dissimilarity of the conditions; and that such judgment of the carriers is not final, but is subject to the authority of the commission and of the courts to decide whether an error has been committed, the burden of proof resting upon the carrier. In the leading case, *In re* Louisville and Nashville R.R. Co.,[5] the commission accepted the existence of actual competition, which is of controlling force in respect to traffic important in amount, as an adequate cause of dissimilarity in circumstances and conditions. That this competition must be actual, of controlling force and relating to traffic important in amount has repeatedly been emphasized by the commission.

> That competition with each other of the railroads which are subject to the federal law can seldom, as we think, make out a case of dissimilar circumstances and conditions within the meaning of the

[4] 6, 488.

[5] 1, 31. The same principles are restated entirely or in part in 1, 236; 3, 534; 4, 1; 4, 104; 4, 228; 5, 324 and other decisions.

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statute, because it must be seldom that it would be reasonable for their competition at points of contact to be pressed to an extent that would create the disparity of rates on their lines which the statute seeks to prevent.[6]

The position taken by the commission in this quotation has been consistently maintained and strongly reaffirmed in a recent decision, except in so far as the Supreme Court decisions in the Alabama Midland (168 U.S. 164), Behlmer and other cases have made modifications necessary.[7]

Competition among railways, as such, is not sufficient to make out dissimilar conditions. Such competition must exist under peculiar circumstances, and even this competition can be accepted as only one of the circumstances and conditions entering into the case. Not one but all the circumstances and conditions must be made the standard of comparison.[8] The competition of railways not subject to the act and of foreign railways has been regularly admitted as one of the circumstances, together with those "rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition."[9] Competition with water carriers may do the same,[9a] although in "some parts of the country it is not easy to separate railroad competition altogether from competition by the water-ways. Water competition is not limited in force strictly to the points of contact of water and rail lines, but extends its influence to an indefinite distance therefrom, qualifying to greater or less extent the all-rail rates."[10] "If the competition of water carriers at any point is large, active and of controlling force, the all-rail lines competing for traffic at the same point may make rates that are reasonable and just in view of such competition, and that will enable them to participate in the traffic. Railways are not obliged to go out of business and leave it as a monopoly to water-carriers";[11] nor can they,[12] under other

[6] **1**, 81; **5**, 324.
[7] **8**, 346.
[8] **1**, 436; **5**, 156.
[9] **1**, 72.
[9a] **4**, 104, 744.
[10] **1**, 81.
[11] **3**, 534.
[12] **7**, 224.

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circumstances, make rates so low as to drive the water transportation out of existence.

Conditions and circumstances admitted as dissimilar and exceptional under section iv must not be of the carrier's own creation or connived at by him. They must be forced upon him by circumstances over which he has no control or which he cannot control with a reasonable effort.[13] In a petition[14] to have the commission order a railway company to charge the same proportional rates on its line between St. Peter and Pierre that it charged between Chicago and St. Peter, it was held that because of the competition of a powerful rival, sparser population, snow blockades and other factors increasing the cost of transportation dissimilar conditions existed, and the petition was denied. In another case,[15] water competition, the character of the road, the nature of the traffic, the preponderance of empty cars necessarily moved and *legitimate competition* with other carriers were admitted as elements determining dissimilarity of conditions. "Legitimate competition" was made to include transportation under circumstances and conditions that make a low rate the only alternative to an abandonment of the business, provided that the rate affords some revenue above cost, and works no material injustice to other patrons of a carrier. When, however, such transportation is carried on at a loss and imposes a burden on like traffic at other points and on other traffic, it is to be deemed destructive and illegitimate competition. In a complaint[16] against blanket rates in force on all-rail carriers between New York and the great oil fields of Pennsylvania, Ohio and West Virginia, on the one hand, and California points, on the other, to the disadvantage of intermediate points, the commission held that the competition of all-water lines, part-water and part-rail lines, part-water and pipe lines constituted dissimilarity of conditions and justified a violation of section iv. During the World's Fair at Chicago, for the better accommodation of its patrons, a railway established a new route from an Ohio town over which the tickets could not be sold except

[13] **2**, 52; **4**, 131; **5**, 324; **8**, 214. [14] **2**, 73. [15] **4**, 1. [16] **4**, 228.

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by violating the long and short haul provision. The commission granted the desired relief.[16a] Similar relief [16b] was granted to a railway in order that it might better serve a region suffering from crop failure.

The Georgia Commission cases [17] decided that the competition of markets on different lines for the sale of commodities at a given point served by both lines does not create conditions which justify deviation from the long and short haul principle. To determine the force and effect of such competition, it was further held, involves commercial considerations, such as the advantages of business location, the comparative economy of production, the comparative quality and market value of commodities, all of which are entirely disconnected from circumstances and conditions under which transportation is conducted. Various other grounds for a refusal of relief under section iv have been indicated by the commission. Among these are: disturbances in rates, whether secret or open;[18] unjust and unreasonable rates on the part of a competitor;[19] potential competition;[20] a longer line on part of a competitor;[21] the fact that a commodity is foreign merchandise;[22] the mere situation on a navigable river;[23] competition of carriers subject to the act.[24] The problem involved in competition among railways will be discussed more fully in connection with court decisions. However, one phase of it, the trade-centre theory, may be noticed in this place.

In the territory south of the Potomac and Ohio and east of the Mississippi, known as Southern territory and controlled by the Southern Railway and Steamship Association, it has been customary to establish rates to competitive stations and make charges to non-competitive or local stations by adding to the rate of a competitive point the local rate from such point to the local destination, taking that competitive rate and that local rate which will produce the lowest combination, regardless

[16a] **6**, 323. [18] **7**, 61. [20] **4**, 104. [22] **4**, 447.
[16b] **6**, 293. [19] **2**, 231. [21] **8**, 346. [23] **1**, 236.
[17] **5**, 324. Similar conclusions in **7**, 224; and **7**, 344 (competition between mines). [24] **6**, 632 and others cited above.

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of whether the competitive or basing point is beyond the local destination or not.[25] Whenever the haul to the competitive point or "trade centre" is longer than that to the non-competitive point for which a greater charge is made, the haul being made over the same line in the same direction, the long and short haul principle is violated, and the non-competitive point can bring action against the carrier under section iv. The trade-centre method is satisfactory, of course, to the "centres" which it establishes and maintains, but brings disadvantage to smaller "non-competitive" towns and rural communities. What shall and what shall not be made a trade centre is finally decided by an arbitrary authority; and no matter how good the intentions, the local or non-competitive points are unable to develop their industries under the same advantages that are enjoyed by the competitive, basing or distributive points, which have been made such not necessarily by any normal and natural process of industrial development, but by chance or caprice or both. Contrary to the contentions of several carriers, the commission has refused to admit that the existence of such "trade centres" or the competition between them creates a dissimilarity of conditions within the meaning of section iv. It has repeatedly condemned the trade-centre idea as interfering with the natural course of trade, establishing arbitrary advantages and violating both the spirit and the letter of the Act to Regulate Commerce. It has held that trade centres are not entitled to more favorable rates than small towns for which they form distributing centres; but no interference has been attempted where small towns get rates as favorable as the larger ones;[26] and the equalization[27] of rates between small and large towns to do away with former special favors does not constitute a ground for complaint.[27a]

The Question of Rates. — The kernel of the railway problem is the question of rates. Few topics of importance in finance

[25] Annual Report, I. C. C. (1892), p. 18; **6**, 343 and cases quoted; **2**, 25; **3**, 19; **4**, 686; **5**, 96. [26] **2**, 25. [27] **1**, 401.

[27a] The manner in which the decisions quoted on preceding pages have been modified by the courts will be discussed in the second and third parts of this paper.

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or administration or any other phase of railway transportation can be investigated without sooner or later touching upon rates as the decisive consideration. Upon no subject has the commission rendered so many decisions as upon this. A long line of cases has arisen directly out of the general question of reasonable rates; another out of discrimination in rates; others, and some of the most important, out of questions connected with exports and imports; and about a dozen groups of decisions or parts of decisions deal with commodity rates and rates on special articles.

The terms "reasonable and just," "unreasonable or unjust," "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage in any respect whatsoever" and "unjust discrimination," as used in the Act to Regulate Commerce, imply comparison, and rates to be lawful must bear just relations to one another.[28] Rates must be relatively fair and reasonable as between localities similarly situated in essential respects, not according to any rule of mathematical precision, but in substance and in fact, having regard to the geographical and relative positions of the localities, so that one will not be favored to the unjust prejudice of the other.[29] Attempts to maintain trade relations, to protect competing markets, to equalize commercial conditions, and analogous considerations cannot justify unreasonableness in rates.[29a] Low charges on one line cannot be made up by high charges on others, and all charges should have a reasonable relation to cost of production and to the value of the service to the producer and shipper, but should not be so low on any as to impose a burden on other traffic.[30] The length and character of the haul, the cost of service, the volume of business, the condition of competition, the storage capacity and the geographical situation at the different terminal points are all elements of importance bearing upon the relative reasonableness of the respective charges for transportation.[31] That rates should be fixed, says the commission, in inverse proportion to the natural advantages

[28] **6**, 458, 548.
[29] **1**, 215; **2**, 315; **4**, 79.
[29a] **6**, 195.
[30] **4**, 48.
[31] **1**, 230.

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of competing towns with the view of equalizing commercial conditions, is a proposition unsupported by law and quite at variance with every consideration of justice.[32] Each community is entitled to the benefits arising from its location and natural conditions. Equality of charge is required under circumstances and conditions substantially similar, and relative equality is necessary in the degree of similarity.[33] The degree of similarity[34] is determined by all the circumstances entering into the case and not solely by one standard of comparison.

It is quite impossible to separate questions relating to reasonable rates, discriminations, through rates, *etc.*, from one another. Yet the subject of discriminations has given rise to more controversy and legislation than, perhaps, any dozen other railway topics, and at least brief separate treatment must be accorded to it. In the popular mind discrimination means unjust discrimination, and to the eyes of legislators all discriminations are unjust. But the well-known illustration of the Delaware oyster town,[35] showing the necessity and justice of discriminations under peculiar circumstances, could be duplicated many times. While all discriminations against individuals, for like and contemporaneous services rendered under "similar circumstances and conditions," are unjust, discriminations against localities may be unavoidable and even just. Sixteen state constitutions and the laws of three-fourths of the states prohibit all discriminations.[36] The Interstate Commerce Act prohibits and declares unlawful *unjust discriminations*, thus reserving to the commission discretionary administrative powers in case of discriminations which, to that body, do not appear to be unjust. While every community is entitled to the benefits arising from its location and natural conditions,[37] and the commission is not authorized to grant special privileges,[38] it may nevertheless permit preferences among localities when sufficient cause exists[39] and these preferences are not undue.

[32] 1, 215; 5, 264; 7, 180. [33] 4, 79. [34] 1, 436.
[35] Hadley, Railroad Transportation, p. 116.
[36] Meyer, Railway Regulation under Domestic and Foreign Laws, p. 931.
[37] 2, 540. [38] 1, 17. [39] 8, 93, 290.

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Among the forms of discrimination pronounced unlawful by the commission are the following: illegitimate use of private cars[40] or cars not owned by the railway company; discounts based on quantity of freight received by a single shipper,[41] or excessive differences in rates on carload and less than carload shipments;[42] combination rates favoring the knowing shipper;[43] mileage tickets not sold impartially;[44] refusal[45] to carry goods over the route directed by the shipper, and directing traffic arbitrarily without good reasons; employment[46] of ticket brokers to sell tickets at reduced rates on commission; party rates lower than contemporaneous rates for single passengers;[47] lower rates[48] from an important centre and not correspondingly lower rates from intermediate points; giving certain shippers exclusive rights over station facilities; the "expense bill" system; carrying to terminal points at commodity rates an article which, if the class rate were imposed, would still seek rail rather than water transportation; and that large class involving rebates in their various forms, excessive charges, *etc.*

Certain things have been pronounced by the commission as not constituting unjust discrimination: the sale of two tickets for passage, one of which the company permits to be transferred and the other not, when the two do not appear to be similar;[49] a contract by a railway company for through shipments with *one* of several competing steamship companies;[50] a low rate for returning oil tank cars,[51] filled with cotton-seed oil and turpentine; absorbing a terminal charge on live stock in one market and exacting such a charge for terminal service in another city which is reached by a different line;[52] charging equal rates on milk for all points on a milk-train line;[53] separation of white and colored passengers paying the same fare, when accompanied by the same care and protection;[54] making

[40] **1**, 374; **2**, 90; **4**, 630; **4**, 265; **5**, 193.
[41] **1**, 107.
[42] **2**, 90; **5**, 638.
[43] **1**, 230; **2**, 1.
[44] **1**, 156.
[45] **7**, 43.
[46] **2**, 513.
[47] **2**, 649; **3**, 465.
[48] **8**, 214.
[49] **1**, 144.
[50] **4**, 265.
[51] **5**, 193.
[52] **7**, 513.
[53] **2**, 272. In the important case, **7**, 92, a blanket rate on milk from certain New York points was held to be unjust; also stated differences in the rates on milk in cans and in bottles.
[54] **3**, 111; **1**, 428.

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rates for immigrants as a class;[55] and finally, when an article of traffic does not move on account of burdensome rates and the carrier is hauling a considerable number of empty cars in the direction such article would naturally move if accorded a lower rate, the carrier may be justified in carrying at a rate that will induce the movement of such traffic, provided no extra or additional charge is in consequence put upon other articles carried.[56]

The hobbyist who urges the adoption of some one of the dozen or more principles upon which railway rates may be based, with the confident belief that his particular scheme would forever settle the difficulties of railway charges, finds little encouragement in the decisions of the commission. No one can go far into the problem of rates without feeling very strongly the utter futility of attempts to reduce all rates to the basis of a single principle. In this, as in so many other domains of economic life, the question is not one *or* the other, but one *and* the other or others. The circumstances and conditions under which goods and persons are transported are far too complex and too involved to admit of so simple a solution for determining rates. The commission, in deciding concrete cases as they have arisen, has fallen back upon various principles of railway rates, giving one or the other a higher rank as the peculiar combination of facts in that case appeared to demand. Hence the decisions contain references to the principles of value, distance, cost, space, weight, *etc.* In one of its earliest decisions[57] the commission enumerated the following factors to be taken into consideration in the determination of just and reasonable rates: (1) the earnings and expenses of operation; (2) rates charged upon the same commodity on other roads similarly situated; (3) the diversities between the railway in question and such other roads; (4) the relative amount of through and local business; (5) the proportion borne by the commodity in question to the remainder of the local traffic; (6) the market value of the commodity; (7) the reductions made by the carrier upon other articles which are consumed

[55] 2, 271. [56] 6, 61. [57] 1, 325.

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and necessarily required by the producers of the article in question; (8) all other circumstances affecting the traffic of itself and as related to other considerations entering into the charges of the carrier.

Rates may be established on a mileage basis[58] and the rate per ton-mile grow less in proportion to distance,[59] but a departure from equal mileage rates on different branches or divisions of the same railway must be clearly shown to be necessary before it can be approved.[60] Through rates[61] are not required to be made on a mileage basis, nor local rates to correspond with divisions of a joint through rate over the same line. Mileage is usually an element of importance, and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges. The distance being in favor of one of two competing points, and neither cost, the value of the service nor other conditions of transportation in favor of the other, the shorter distance point cannot justly be denied at least equal rates with the longer.[62] The market value of a commodity, the value of the transportation service to the commodity, its cost of production and the actual cost of carriage are elements of importance in establishing rates.[63] Value is another important element, but it cannot be made an arbitrary standard independent of all other considerations.[64] Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier and to the commercial value of such traffic; but it is incumbent on parties invoking this rule to make satisfactory and reliable proof as to such antecedent cost and commercial value,[65] and in case of competitive articles[66]

[58] **1**, 629. [59] **2**, 52. [60] **5**, 612. [61] **3**, 252. [62] **6**, 342.

[63] The writer refrains from discussing in this place the meaning of the terms "value," "cost," "expense," *etc.*, as used in transportation matters. A variety of definitions can be constructed synthetically from the decisions. The writer is inclined to restrict the use of the term "value of service" to value of service *to the commodity* considered as an object of purchase and sale on a competitive market; and "cost of transportation" to material sacrifices made by a railway in carrying a particular article at a certain time (which, as is well known, cannot be accurately determined for a particular service).

[64] **8**, 158. [65] **5**, 529. [66] **4**, 611.

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over the same line the relation of rates should be determined by reference to the respective costs of service ascertained with reasonable accuracy. Although rates should bear a reasonable relation to cost of production and to the value of the service to the producer and shipper, they should never be so low as to impose a burden on other traffic;[67] nor can small earnings,[68] extraordinary or unnecessary cost of operation or management,[69] or other financial necessities[70] and conditions of the carrier justify excessive rates. The degree of risk to the carrier[71] and the capitalization of a railroad[72] have a bearing upon rates. The latter, in order to have consideration, should be accompanied by a history of the capital account, the value of the stock and various securities, and the actual cost and value of the property itself. To make the capital account of railways the measure of legitimate earnings would place, as a rule, the corporation which has been honestly managed from the outset under enormous disadvantages.

Classification. — That rates can be changed by modifying classifications is an elementary proposition of transportation. That principles of railway rates constitute the decisive factors in classification is its corollary. A study of classifications is inseparable from a study of rates, and *vice versa*. The great classifications in force in the United States to-day are the result of years of effort in improving some original schedules and in consolidating and eliminating scores of others. The three dominating classifications of to-day, with more than 7000 specifications, are a great advance upon the schedule of 1856 with thirty-three specifications. This development has been one steady march towards uniformity, in which the Interstate Commerce Commission has always stood on the side of progress, and arguments in favor of a uniform classification have been repeated many times in its reports. "The Commission has repeatedly said that the re-arrangement of rates and the simplification of classifications are matters which the carriers should undertake and should carry forward for themselves."[73]

[67] **4**, 48. [68] **1**, 375. [69] **7**, 92. [70] **6**, 601. [71] **6**, 131; **1**, 465. [72] **8**, 158. [73] **3**, 19.

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While the commission has been reluctant to enter upon active classification making, its decisions are not without direct bearing upon specific questions relating to classifications, especially in matters of principle. Classification is deemed convenient and essential to any practical system of rate-making, and is so recognized, though not enjoined, by the Act to Regulate Commerce.[74] And when a classification is used as a device to effect unjust discriminations, or as a means of violating other provisions of the statute, the act requires the commission to so revise and correct such classifications and arrangement as to correct abuse. A manufacturer of soap advertised and sold as toilet soap made complaint against a railway company for classifying his soap with other toilet soaps and not with the lower class of laundry soaps. The commission held that a manufacturer's description of an article designed to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates.[75] In another case[76] the commission held that two kinds of soap advertised as alike, and substantially equal in value, should be classified alike for transportation purposes. Products classified alike are presumptively entitled to equal rates;[77] in classifying them, cost,[77a] bulk, weight, value and their general characteristics should be chief considerations;[78] clearness and simplicity should be aimed at and irregularities and inconsistencies eliminated;[79] and a classification must have the same construction in favor of all persons.[80] Unjust discrimination against a commodity is not shown by evidence of a lower classification for articles widely dissimilar in the elements of risk, weight, bulk, value or general character. The proper method of comparison is the classification accorded by the carriers to similar articles.[81] Railway officials who have made a classification cannot testify to their understanding of its construction. A classification sheet is put before the public for general information; it is supposed to be expressed in plain terms so that

[74] **4**, 535.
[75] **4**, 41; similarly in **4**, 32.
[76] **4**, 733.
[77] **3**, 252.
[77a] **6**, 52.
[78] **6**, 548.
[79] **2**, 1.
[80] **2**, 122.
[81] **5**, 638.

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the ordinary business man can understand it and in connection with the rate sheets can determine for himself what he can be lawfully charged for transportation. The persons who prepared the classification have no more authority to construe it than anybody else, and they must leave it to speak for itself.[82]

Through Rates. — Through rates and through billing are matters of agreement among carriers engaged in interstate commerce. The commission has no power to compel them against their consent to enter into arrangements for through rates and for through bills of lading,[83] although the statute encourages such connections,[83a] because they furnish cheapened rates and greater facilities to the public, while at the same time they give increased employment and earnings to a larger number of carriers.[83b] Railway companies may make whatever rates, form whatever lines and establish whatever differentials they deem best for the purpose of securing and conducting transportation, provided the just interests of the public are not sacrificed thereby; and whether in so doing they deal with each other wisely or unwisely, fairly or unfairly, is not a matter for the commission to decide.[84] A through bill of lading is evidence of a through rate.[85] It is not necessary that it should be formally "quoted" by one of the carriers to another who is engaged in the making of it to constitute it a through rate. Names are nothing in such a transaction; the law looks at the elements and substance of the transaction itself. The fact that the initial or an intermediate carrier charges the full local rate does not destroy the through nature of the shipment,[86] nor is a through rate illegal which, when divided between carriers, gives them less than their local rate, provided that the through rate itself is not less than some one of the local rates, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed.[87] Reasons may exist for making

[82] **2**, 122.
[83] **4**, 265; **6**, 647; **7**, 376.
[83a] **4**, 535.
[83b] **4**, 535.
[84] **7**, 612.
[85] **2**, 131.
[86] **2**, 131; **6**, 1.
[87] **2**, 584; **4**, 744.

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through rates less than the sum of the local rates,[88] and traffic conditions may warrant carriers in exacting a share in through rates which gives them more per mile than that which results to a connecting carrier from the division accepted by it;[89] but in such cases carriers must give proof of the circumstances which justify the disproportionate division of a through rate.[90] Although a shipper or consignee has no direct interest in the way a joint rate is divided between carriers, nor in the amount of the division received by each carrier, he is entitled, nevertheless, to inquire into such division when he complains that the joint rate is unlawful, for the amount received by the different carriers may be significant upon the reasonableness of the aggregate charge; and when an unlawful rate results from some arbitrary division exacted by one of the carriers, the commission will find the facts and state its conclusions with respect to such share or division.[91] Such complaints, even though brought in the name of an individual, may challenge the entire schedule of rates to competing towns, and such cases, as distinguished from those involving individual grievances only, are peculiarly public in their nature, since they embrace in one proceeding the various business and industrial interests in cities and towns, as those interests may be affected by the charges of public carriers whose facilities are employed in the interchange of commerce.[92] The commission inquires primarily into the influence of a through rate taken as an entity. How the rate is made[93] is only material as bearing upon the legality of the aggregate charge, and how any reduction may be accomplished is a matter for the carriers to determine among themselves.[93a] The tariff of rates should also show which carriers united in establishing the joint rates.[94] In the division of joint rates[95] each carrier may receive less than its established local rate; one may receive more and another less than full local rates; but whatever the basis of division, the essential feature of such rates is that the connecting carriers have agreed or

[88] **3**, 450.
[89] **8**, 277.
[90] **6**, 1.
[91] **8**, 598; **5**, 13; **2**, 131.
[92] **6**, 458; **5**, 97.
[93] **2**, 553.
[93a] **5**, 324.
[94] **5**, 44.
[95] **7**, 323.

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mutually consented to carry traffic over the connecting line for a less aggregate charge than the sum of their established local rates. So-called through export rates, *i.e.*, rates by rail plus rates by water, are not analogous to joint rates made by joint arrangements, and an "export rate" may be lower than the rate on the same commodity from the same origin and bound for the same port but not for export, because it is in essence the division of a through rate.[96]

Not to be confused with through rates are combination rates, obtained by adding to the through rate to a certain point the local rate from that point back to the point of destination. This system prevails most widely in southern territory and is connected with the trade-centre theory. Combination rates generally bring disadvantages to the towns to which they apply and advantages to basing points;[97] and when combination rates produce a lower rate than the tariff calls for, they enable the knowing shipper to obtain advantages over the one who has less information.[98]

Differential rates have been treated by the commission chiefly in connection with export rates to competing seaports and longer routes competing for traffic to a common centre. The export-rate cases will be discussed in a later paragraph; suffice it here to call attention to the grounds upon which the commission justified a differential export rate to Boston, via New York, as low as the rate to New York. These grounds were: (1) the greater cost of transportation to Boston; (2) the greater volume of business to and from New York; (3) the competition of the Lake, Erie Canal and Hudson River route, as well as of the railways; (4) the geographical and commercial advantages of New York.[99] However, it should also be observed that the commission has held it neither sound in principle nor equitable in practice for railway lines to create artificial differences in market conditions by an arbitrary differential in rates, whereby the product of one section of the country is assigned to one market and the product of another section of the country to another market.[100]

[96] 8, 214. [97] 8, 277. [98] 2, 1. [99] 1, 24, 436.
[100] 8, 185; see also 5, 571; 7, 481; 7, 612; 8, 47.

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Pooling. — Section v of the act prohibits pooling. What constitutes pooling within the meaning of the statute has been decided by the courts, and will be considered in Part II of this paper. Reference is here made to rulings of the commission on contracts and agreements among railway companies other than illegal pooling contracts. An early decision,[101] confirmed by a recent one,[102] maintains that an intra-state railway becomes interstate when it voluntarily enters into through-shipment arrangements; but shipments from within a state with the *intention* of reshipment *beyond* the state is not interstate commerce.[102a] The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage or shipment, and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law;[103] and the successive receipt and forwarding in ordinary course of business by two or more carriers of the interstate traffic shipped under through bills for continuous carriage over their line is assent to a "common arrangement."[103a] A railway is obliged to transport freight when the same is offered in the usual way, without any special agreement.[104] Agreements among railway companies supplying a common market from competitive productive areas, which bring advantages to one such area, but disadvantages to the other, are violations of the act.[105]

Referring to the question of jurisdiction, it should be observed that the commission has included in the "instrumentalities of shipment or carriage" subject to the act a small road wholly within a state, but used for interstate traffic;[106] likewise commerce between points in the same state, but passing through another state;[107] an electric railway between the District of Columbia and the state of Maryland;[107a] a bridge extending across a stream from one state into another;[107b] live stock carried through different states to stock yards in a centre

[101] **1**, 315.
[102] **8**, 531; see also 167 U.S. 642, and 162 U.S. 184.
[102a] **1**, 30.
[103] **5**, 324; **6**, 1.
[103a] **6**, 1.
[104] **1**, 594.
[105] **6**, 195.
[106] **1**, 495.
[107] **1**, 495.
[107a] **7**, 83.
[107b] **2**, 162.

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of this trade is interstate commerce until delivery is made at such yards;[107c] a foreign carrier;[108] and foreign merchandise carried on a through bill of lading.[109] Among the matters held not subject to its jurisdiction the commission has mentioned the following: a steamboat plying between two ports in the same state but engaged in interstate traffic;[110] fruit destined to New York but shipped only to Jersey City from points in New Jersey;[111] compelling railways to allow extra baggage to commercial travellers;[112] or to provide a particular kind of cars or other special equipment;[112a] to award counsel fees;[113] to render judgments and enter decrees.[114] The jurisdiction of the commission in matters relating to orders on rates will be discussed in connection with court decisions.

What has been presented thus far may be considered a code for the administration of railways prescribed by the Interstate Commerce Commission.[114a] This code is based upon the *formal* decisions of the commission. Its *informal* work appears at times to overshadow that which is formal; and in an estimate of the services of the commission informal hearings and mediations should receive a high place. Indeed, there are persons who rate the mediatory work of the commission higher than the performance of its formal functions. On the whole, "the Interstate Commerce Commission has done a great work; no commission or court in this country has ever done a greater work in the same length of time."[114b]

[107c] 7, 513. [108] 3, 89. [109] 4, 109. [110] 4, 265. [111] 2, 142. [112] 1, 122. [112a] 5, 193. [113] 1, 339. [114] 5, 166.

[114a] "This, then, is the significant fact in the life of the commission: that out of the opinions expressed upon cases there has begun to develop a system of authoritative rules and established interpretations, which, sooner or later, will come to be recognized as a body of administrative law for inland transportation." — H. C. Adams, "A Decade of Federal Railway Regulation," *Atlantic Monthly*, 81: 433–443.

[114b] Senator Cullom, in the *Railway Age and Northwestern Railroader* (April 14, 1893).

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II. *The Supreme Court and the Interstate Commerce Commission.*

Many of the principles promulgated in the decisions of the commission have been radically modified or overruled by the Supreme Court of the United States. For the purposes of this discussion only four groups of decisions will have to be considered: First, court decisions affecting the interpretation of the long and short haul clause; or, more definitely, what are the factors to be included in "circumstances and conditions" affecting long and short hauls. Second, the limitations placed by the court on the commission's power over railway rates. Third, the power of the commission in securing testimony. And fourth, decisions relating to agreements and contracts among competing railway companies. The treatment by the courts of the findings of fact before the commission should, perhaps, also be commented upon in this connection, but that question can be considered equally well in the closing part of this paper.

The Interpretation of the Long and Short Haul Clause. — On March 23, 1889, the commission made an order which, among other things, provided as follows:

> Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights.

Thirteen roads alleged conformity to the order of the commission, three complied with the same within three months and eight continued to charge less on imports than on the carriage of domestic traffic. Business organizations of New York, Philadelphia and San Francisco brought action against the railways violating the order of the commission with respect to the relative rates on imports and domestic freight, and on January 29, 1891, the commission handed down the decision [115] known as the Import Rate decision, — one of the most important decisions in the history of the federal regulation of railways.

[115] 4, 448.

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Ample evidence was introduced by the complainants showing that certain carriers were charging less on imported goods than on domestic goods or on freight originating at seaboard points and shipped, perhaps, on the same train with goods of foreign origin to interior or other seaboard points.

> Not only was there a lower rate for the inland carriage of foreign traffic, but in numerous cases the total charge from the foreign place of origin through our seaports to destination in the interior of the United States was much less than the rail charge alone on domestic goods of like description from the same seaports to the same destination.[116]

On certain classes of domestic goods the freight rates from New Orleans to San Francisco were more than three times the through rates from Liverpool to San Francisco on similar goods. The defendant carriers justified their action on the ground that the imported goods were carried under circumstances and conditions substantially dissimilar from those under which domestic goods were carried, because of the competition of ocean lines and ocean and rail lines. They also maintained that the rate on foreign goods from the seaboard to interior towns was a part of the through rate from the foreign point of origin, and that this part of the through rate could, under the law, be less than the local rate over the same line for the same distance. But the commission denied the right of the railways to discriminate between domestic and foreign goods, and furthermore maintained the opinion that extraterritorial influences, such as the competition of ocean lines or circumstances affecting the movement of foreign commerce before reaching our own country, did not constitute a dissimilarity of circumstances and conditions within the meaning of the Act to Regulate Commerce, and insisted on obedience to the order of March 23, 1889. Some of the carriers refusing to obey, a petition was filed against one of them for the enforcement of the order by a United States circuit court, from which an appeal was taken to the circuit court of appeals, and finally to the Supreme Court of the United States.

[116] Annual Report, I. C. C. (1896), p. 8.

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The two lower courts upheld the decision of the commission, but the Supreme Court refused to accept the interpretation of the law as construed by the commission and lower courts and held [117] that

> among the circumstances and conditions to be considered as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered.

In other words, extraterritorial influences as well as competitive conditions arising wholly outside of the field occupied by the carrier may be considered in determining similarity and dissimilarity of circumstances and conditions; and consequently the commission erred in not considering *all* the circumstances and conditions entering into the case.

In thus widening the meaning of the phrase "circumstances and conditions," the Supreme Court entered the wedge which the Troy case [118] drove in full length half a decade later, and which reduces the long and short haul clause of the act to nullity, so that no tangible meaning can be assigned to the same at present. Troy is a city in Alabama reached by two railways and situated fifty-two miles from Montgomery. Montgomery may be reached by a number of different railways. The rates on traffic going over one of these railways through Troy to Montgomery were higher to Troy than to Montgomery, the railway in question justifying this greater charge for the shorter distance to Troy on the ground that the competition in Montgomery made the circumstances and conditions under which traffic was conducted in Montgomery different from those prevailing in Troy. The commission ruled that the competition of the railways centring in Montgomery, all of which are subject to the Act to Regulate Commerce, did not justify any one or all of them in violating the long and short haul clause. The commission has repeatedly held, as stated in Part I, above, that not one or several but all the circumstances and conditions must be drawn into consideration, but the competition of carriers

[117] 162 U.S. 197. [118] 168 U.S. 144.

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subject to the act had been considered outside of the scope of this principle.[118a] Not so with the Supreme Court. It reaffirmed the Import Rate decision, and held that railway competition can create discriminating circumstances and conditions, and that therefore the higher rate to Troy is not prohibited by the long and short haul section.[119]

Competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce.

Competition which affects rates must be considered in section iv but not in section ii. "Under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes. "The mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraints of the third and fourth sections." It should be noticed that in a different case,[120] arising under section ii, which prohibits discriminations among persons, the Supreme Court held that the phrase "under substantially similar circumstances and conditions" does not include competition, and that this phrase "may have a broader meaning or a wider reach in section iv [long and short haul] than the same phrase found in section ii."

The Import Rate and Troy cases, by extending the "reach" of the phrase "substantially similar circumstances

[118] "It is improbable that the commission will interpret the act in the sense that the words 'under substantially similar circumstances and conditions' justify all existing differential rates due to competition. This would practically emasculate the law. . . . The act is an expression of a correct principle, but the limitations of the principle are no less obvious." — Seligman, "Railway Tariffs and the Interstate Commerce Law," POLITICAL SCIENCE QUARTERLY, II, 263 (June, 1887).

With remarkable insight Professor Seligman outlined probable consequences of the act which future experience has amply demonstrated. Written immediately after the passage of the act, the analysis of railway problems presented in the article is the more striking in the accuracy with which the generalizations reflect the events which future years were to bring upon us.

[119] Sec. iv. [120] 167 U.S. 512.

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and conditions" to include competition among railways subject to the act, opened the portals wide for that discrimination among places that was prohibited under section iv.

Power of the Commission over Rates. — In the annual report for 1897 [121] the commission stated that it had exercised the power to prescribe reasonable and just rates for a period of ten years, beginning with an order made in the second month after its organization. "Of the 135 formal orders made in the suits actually heard from its institution down to the present time, 68 have prescribed a change in rate for the future." [122] "We have now before us 38 cases in which the main question is one of a reduction of the freight rate." [123] This represents the practice of the commission during the first ten years of its existence. It is a fact of common knowledge that the notions which existed in Congress in 1887 on the subject of interstate commerce were vague and imperfect, and that this feature in the situation naturally led to the loose and imperfect character of the act. The practice of the commission to prescribe rates, under certain conditions, was fostered by the necessity of the situations which had to be met; and the reversal of this policy by decisions of the Supreme Court placed the administration of the Interstate Commerce Act on an entirely different basis.

During the fifth year of its existence the commission asserted [123a] that it was not restricted

> to finding that an existing rate is unreasonable and forbidding its continuance, but has the further authority to ascertain, order, and enforce a rate that is reasonable. The power to determine and declare what is a maximum reasonable rate also results from those provisions of the Act which require the commission to determine what reparation, if any, should be made by carriers to parties injured by their violations of the law, and in cases of unreasonable rates the measure of reparation due to such a party is the difference between the rate actually charged and the reasonable rate which should have been charged.

[121] Annual Report (1897), p. 11.
[122] Annual Report (1897), p. 16.
[123] *Ibid.*, p. 22.
[123a] 5, 97.

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This was reaffirmed in a subsequent decision.[123b] But the commission has never claimed the power to prescribe a rate in the first instance. "Its power in respect to rates is to determine whether those which the roads impose are, for any reason, in conflict with the statute."[124] "We sit for the correction of what is unreasonable and unjust in those tariffs."[125]

The first prominent case[126] leading to the present interpretation of the law arose on the complaint of a Cincinnati firm against a railway for charging more per hundred pounds of freight to Social Circle than to Augusta, 119 miles farther on the same line; and, secondly, for charging rates to Social Circle and to Atlanta which were in themselves excessive and undue. After a full hearing and investigation the commission, among other things, issued an order requiring the railway company to cease and desist from charging more than a certain amount on such freight from Cincinnati to Atlanta. The circuit court to which an appeal was taken refused to enforce this order, and the case finally reached the Supreme Court.[127] Discussing that part of the case which relates to the prescription of rates, the court said:

> We do not find any provision of the Act that expressly, or by necessary implication, confers such a power. It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.[128]

The commission construed this, as well as analogous opinions of the court in the Import Rate decision,[129] as implying that "if the Commission does withhold its judgment until issue shall be made and the facts found, and then requires a carrier not to exceed charges indicated by the evidence to be reasonable

[123b] 5, 122. [124] 1, 152. [125] 7, 191. [126] 4, 744. [127] 162 U.S. 184. [128] P. 196. [129] 162 U.S. 197.

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and just, such action is authorized by the Act."[130] Acting upon this assumption, the commission undertook to prescribe maximum rates and was again overruled by the Supreme Court,[131] which held that neither the court nor the commission can "undertake to name a maximum rate in advance and enjoin a carrier from violating it." The power of the commission over rates, said the court, is confined to inquiries as to railway management, the prevention of violations of the long and short haul clause, of discriminations and of undue preferences, and the securing to all shippers of "that equality of right which is the great purpose of the Interstate Commerce Act." In a case involving the relation of rates on the same class of goods from a Colorado point to San Francisco and from Chicago to San Francisco, the commission issued an order fixing a maximum rate from the Colorado point to San Francisco and specified that the same should not exceed a certain percentage of the rate from Chicago. This order was obeyed for about two years, when it was violated by one of the roads. The case, coming before the circuit court of appeals, was decided adversely to the commission, in harmony with the other court decisions cited above. This was in April, 1900, and since that time nothing has transpired which would warrant the assumption that the commission has power to establish rates for the future. All that this body can do at present is to pass upon a rate actually in force, pronounce the same reasonable or unreasonable and, if the latter, investigate the rate after it has been modified by the carrier voluntarily or under compulsion of the courts, even by a fraction of a cent, and then continue this seesaw process until a reasonable rate has been evolved. Paraphrasing the words of a critic of the old Articles of Confederation, the commission can "recommend everything and do nothing."

The Power of the Commission to secure Evidence.—Section xii of the Act to Regulate Commerce, both in its original form and as subsequently amended, gives the commission power to require the attendance of witnesses and the production of books

[130] Annual Report (1896), p. 22. [131] 167 U. S. 479.

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and papers, refusal being punishable by the courts. The amended form of 1889 repeated the original wording of the concluding sentence of section xii, as follows:

> The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The amendment of 1893 was more explicit in respect to compulsory testimony and the penal consequences of the failure to comply with the summons of the commission, and sought to protect the witness in the following language:

> But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

These provisions indicate the statutory law in the matter in so far as it is found in the Act to Regulate Commerce. Section 860 of the Revised Statutes of the United States, which had been in force for a quarter of a century, and which provides that witnesses shall not be excused from testifying because their testimony may tend to criminate them, and that such testimony shall not be used against persons so testifying in any criminal proceedings, was incorporated, in substance, in the original law, as well as in the amendment of 1889. The amendment of 1893 was intended to meet the decision of the Supreme Court in the Counselman case,[132] declaring section 860 of the Revised Statutes unconstitutional, because it did not assure that absolute immunity against future prosecutions that is guaranteed by the fifth amendment of the Constitution of the United States. Counselman had refused to obey the summons to testify before a grand jury; and, being held for contempt of court, he appealed to the Supreme Court of the United States, with the result as indicated above. A year

[132] 142 U.S. 547.

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later the amendment of 1893 was passed, but it required three years more to make it effective, so that the commission existed for over six years without that power which would make it practicable to obtain testimony on which to enforce the penal provisions of the act.

The steps by which the power was finally secured may be briefly outlined by reference to the James, the Brimson [132a] and the Brown cases. The James case is of minor consequence because no appeal could be taken to the Supreme Court; as decided by the circuit court it was unfavorable to the amendment of 1893, as not affording the immunity guaranteed by the Constitution of the United States. The court held that while, under the amendment a witness might be freed from the legal consequences of his testimony, the government could not by any enactment save him from the disgrace and taint upon his character which a disclosure of his connection with crime might entail. The Brimson case originated in the same court. The commission applied for an order to compel one Brimson to answer questions propounded to him by the commission and to produce books, but the application was refused on the ground that that part of section xii of the Interstate Commerce Act authorizing or requiring courts to use their power in securing compulsory testimony before the commission was unconstitutional. This was nearly a year before the passing of the amendment of 1893, so that the decision of the Supreme Court, on an appeal by the commission, related in part at least to the law as amended in 1889. Nevertheless, the Supreme Court held [133] that

> the twelfth section of the Interstate Commerce Act, authorizing the circuit courts of the United States to use their process in aid of inquiries before the Commission established by that act, is not in conflict with the Constitution of the United States.

This decision alone was probably sufficient to enable the commission to secure the necessary evidence, but the Brown

[132a] 154 U.S. 447; 155 U.S. 3 (dissenting opinion).
[133] 154 U.S. 447.

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case [134] covered all the essential features of the Counselman, James and Brimson cases combined, and effectually removed the last difficulties in the way of securing for the commission the testimony of recalcitrant witnesses. Brown was a railway official who refused to answer the questions put to him by the commission, on the ground that such testimony might incriminate himself. On this point the Supreme Court said that the clause upon which Brown relied should be construed "to effect a practical and beneficent purpose — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony"; and, commenting upon the possible disgrace which might come to a witness who discloses criminal acts, the court further said:

> The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal. . . . The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge.

Since this decision, in 1896, the power of the commission to secure testimony may be regarded as full and adequate; but in all seriousness the query must be added: What is there to prevent an unscrupulous railway official from violating the Interstate Commerce Law in the most flagrant manner, and then testifying with the view of securing personal exemption from the penal provisions of the act?

Indirectly connected with the subject-matter of the preceding paragraph stands the question of the weight given by the courts to the findings of fact by the commission. Section xiv of the act provides that the findings of the commission shall be deemed *prima facie* evidence in all judicial proceedings as

[134] 161 U.S. 591.

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to each and every fact found; yet it is well known that when cases reach the courts new testimony may be admitted and the entire case perhaps be tried *de novo*,[135] so that the case before the courts is entirely different from that before the commission. In the Import Rate case[136] the Supreme Court incidentally touched upon the treatment of cases brought in the courts to enforce the orders of the commission, as follows:

> The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was . . . ; yet, as the act provides that, on such hearing, the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the commission has failed in its proceedings to give notice to the alleged offender, or has unduly restricted its inquiries upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in.

Agreements and Contracts among Competing Railways. — That the effect of the anti-pooling provisions of the Interstate Commerce Act has been the exact opposite of what was intended, has for years been a matter of public knowledge. The effort to prevent by law agreements among competing railways has resulted in consolidation — a form of combined effort much more effective and lasting in its consequences than any pooling arrangement could ever have been. The union of separate and formerly competing companies into one larger, compact and firmly organized corporation is something with which the federal law has never been concerned, but the looser and usually more temporary agreements among railways are by the statute expressly declared unlawful! In addition, the law contemplates stability of rates, relatively just rates and

[135] 37 Fed. Rep. 567; 94 Fed. Rep. 272. [136] 162 U.S. 197.

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other like ends, which depend upon coöperation! At the present time the larger competitive systems of the United States number about twenty, while at the time of the enactment of the Interstate Commerce Act there were more than five times that number.[137] That this has been the universal history of railway competition is a fact too familiar to require elaboration in this place.

When we view the facts of railway history, the steady and uninterrupted consolidations which have absorbed line after line, on the one hand; and the contemporary existence and growth and duplication of laws attempting to govern these, on the other, the conclusion is irresistible that somehow these laws did not accomplish the purposes for which they were enacted.[138]

The first important decision of the United States Supreme Court, after 1887, bearing upon agreements among railways was the decision against the Trans-Missouri Freight Association in 1897. This association had been formed in 1889, "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." The decision involved two leading questions: First, does the "Act to protect trade and commerce against unlawful restraints and combinations," popularly known as the Sherman Anti-Trust Law of 1890, apply to and cover railways? Second, if so, does the Trans-Missouri agreement violate any provisions of this law? The court answered both questions in the affirmative.

The Joint Traffic decision,[139] which followed a year and a half later and covered essentially the same ground, involved in addition several subsidiary questions: Does the Joint Traffic agreement actually prevent the constituent railways from competing with one another? Is the Anti-Trust Law constitutional? And, finally, does the Joint Traffic agreement violate the anti-pooling provisions of the Interstate Commerce Law? As to the leading questions, the court held

[137] Consult Newcomb, "Recent Great Railway Combinations," *Review of Reviews*, August, 1901.

[138] Meyer, "Railway Regulation," in Report U. S. Industrial Com., IX, 929.

[139] 171 U.S. 505.

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that the Anti-Trust Law applies to *all* combinations, including those among common carriers. Combinations "may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest." The decision recounts the history of the Anti-Trust Act in Congress, which goes to show that the act applies to the Trans-Missouri agreement and that it includes *every* contract and prohibits *every* agreement in restraint of trade, no matter what its terms may be. Hence the law forbids *all* contracts, whether just or unjust, whether in reasonable or unreasonable restraint of trade. "The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into combination with competing roads to maintain such rates, cannot be admitted."

Both the Interstate Commerce Law and the Anti-Trust Law have thus had the effect of discountenancing coöperative arrangements of every kind among railways other than that closer coöperation under unified management in corporate form. Both have accelerated the natural tendency of railways towards consolidation, and both have signally failed in accomplishing the purpose for which they were enacted. Both prohibit associated action of companies so long as they are separate, but leave them to themselves after consolidation.[140]

III. *The Cullom Bill.*

In another connection[141] the writer has stated three propositions which may serve as an introduction to a discussion of pending legislation: (1) That the present situation with respect to railway affairs in the United States is untenable and indefensible. (2) That the great majority of railway

[140] It is needless to say that this statement, while true as a general proposition, requires modification in so far as the actual powers of the commission permit regulation; nor does the statement take cognizance of that form of railway coöperation which is said to exist upon no formal agreements but rather upon what "any one was saying as he looked at his neighbor."

[141] "Advisory Councils in Railway Administration," *Annals of the American Academy of Political and Social Science*, January, 1902.

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managers and other railway officials are sincerely desirous of administering, to the best of their abilities, the properties under their control in the most efficient manner, having due regard for the interests of both the stockholders and the public; but that *all* the various interests affected by their action are not represented in proportion to their importance, if at all; and that consequently injustice may be done. (3) That there is nothing in the present statutory and administrative regulation of railways to prevent the arbitrary and harmful action of the weak or unscrupulous manager from defeating the desires of the majority of the officials, who would voluntarily pursue a more beneficent course.

The third proposition bears directly upon the present status of the Interstate Commerce Law. "That the leading traffic officials of many of the principal railway lines — men occupying high positions and charged with the most important duties — should deliberately violate the statute law of the land, and in some cases agree with each other to do so; that it should be thought by them necessary to destroy vouchers and so to manipulate bookkeeping as to obliterate evidence of the transactions; that hundreds of thousands of dollars should be paid in unlawful rebates to a few great packing houses; that the business of railroad transportation, the most important but one in the country to-day, paying the highest salaries and holding out to young men the greatest inducements, should to such an extent be conducted in open disregard of law — must be surprising and offensive to all right-minded persons. Equally startling, at least, is the fact that the owners of these packing houses, men whose names are known throughout the commercial world, should seemingly be eager to augment their gains with the enormous amounts of these rebates, which they receive in plain defiance of a federal statute. These facts carry their own comment, and nothing said here can add to their significance. The commission is not unmindful of the palliating circumstances under which railway traffic officials act. These have been fully set forth in previous reports, and the commission has stated in that connection what, in its

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opinion, is the proper remedy. We certainly believe that existing laws should be so amended that railway managers who desire to observe them can do so without risk of sacrificing their property."[141a] The commission may mediate, report, advise, investigate, order — all good things in themselves and sometimes very effective; but when it comes to the vital point of enforcing right rules of action it is absolutely helpless in practice, irrespective of what theoretical analyses of the law may attribute to it. To repeat an earlier statement, the commission may recommend everything and do nothing. Neither in the federal law, nor in the laws of a single state, nor in the laws of all the states collectively does there exist adequate power to protect the railways against each other, on the one hand, or the public against the railways on the other.[142] In view of such a situation, amendments to the Interstate Commerce Law are imperative. Several of these are indispensable; with respect to others, compromises might well be resorted to, or they might be omitted altogether, if thereby the work of bringing into existence an efficient law can be facilitated.

The changes contemplated in the Cullom Bill[143] are enumerated differently by different persons, varying in number from several to nineteen,[144] depending upon individual classifications and judgment. The centre of the "railway problem" has always been the question of rates, and it is but natural that the nucleus of the proposed amendments should consist of provisions governing rates. Under the present Interstate Commerce Law, as interpreted by the Supreme Court, the commission has no power to prescribe a rate for the future. The commission has power to pass upon the absolute and

[141a] Synopsis of Fifteenth Annual Report (1902).

[142] Meyer, "Railway Regulation," Report United States Industrial Commission, IX, 937.

[143] Bill S. 1439, 56 Cong., 1 Sess. A bill to amend an act entitled "An Act to Regulate Commerce," *etc.* This bill has not yet been taken up by the present Congress. A similar bill had been introduced in the preceding Congress by Senator Cullom.

[144] Blanchard, Testimony before Senate Committee on Interstate Commerce (1900), p. 382.

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relative reasonableness of a particular rate and, if the rate is found unreasonable, order a reduction or a change in the relations of rates. This order can be enforced through the courts. "Now the actual history of these suits shows that it has required between three and four years to arrive at a conclusion." [145] Let us assume three years as the average. Suppose a certain rate of $1.25 is pronounced unreasonable, and that $1 is considered reasonable. The latter the commission cannot prescribe under the present law, but it can order a reduction of the former. A recalcitrant manager satisfies the order of the commission by reducing the rate a fractional part of a cent, after three years of litigation in the courts! Even at the rate of five cents per order, it would require fifteen years to establish the reasonable rate! But long before this result may have been achieved new contingencies may have arisen and a rate which at first appeared reasonable may be most unreasonable under the changed circumstances. Practically, immediate obedience to orders is the only manner in which carriers and shippers can be protected. A delay of some duration, or even of a week, may change the situation enough to make future changes relatively valueless to the complainant. Here, as in so many other cases, we are again confronted by the relentlessness of the third proposition, — there exists no power capable of compelling prompt obedience. "Promptness" which consumes years and which affects interests based upon short periods of time is an abuse of the English language. The Cullom Bill provides a remedy:

If after a full hearing it is determined that any party complainant is entitled to an award of damages under the provisions of this Act for a violation of its provisions, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If, after such hearing, it is determined that any carrier is in violation of the provisions of this Act, the Commission shall make an order directing such carrier to cease and desist from such further violation, and *shall prescribe in*

[145] Commissioner Prouty, Testimony before Senate Committee on Interstate Commerce (1900), p. 37.

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such order the thing which the carrier is required to do or not to do for the future to bring itself into conformity with the provisions of this Act; and in so doing it shall have power (*a*) to fix a maximum rate covering the entire cost of the service, (*b*) to fix both a maximum and minimum rate, or differential in rate, when that may be necessary to prevent discrimination under the third section, (*c*) to determine the division between carriers of a joint rate and the terms and conditions under which business shall be interchanged when that is necessary to an execution of the provisions of this Act, (*d*) to make changes in classification, (*e*) to so amend the rules and regulations under which traffic moves as to bring them into conformity with the provisions of this Act.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act. An order not for the payment of money shall be termed an administrative order.

Every order shall fix the date when it is to take effect, which shall in no case be less than ten and ordinarily not less than thirty days from the service of such an order upon the carrier. Such order shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy of the report and opinion of the Commission, together with a copy of the order, and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

Perhaps the most important feature of this section is the power which it gives to the commission to prescribe what "to do or not to do for the future" in order to bring about a line of action in harmony with the law. What follows are essentially consequences and conditions. Charters and earlier laws took care to prescribe maximum rates, which were frequently placed so ridiculously high that practically no railway manager would ever think of charging them. Minimum rates were rarely prescribed, and differentials never. It is otherwise with the proposed law. The establishment of minimum and differential rates is at present of infinitely greater consequence than the prescription of maximum charges. The power of the commission in determining divisions of through rates is likely to do away with one of the sources of discriminations.

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All legislation rests upon the assumption of a reasonable purpose and the prevalence of good sense among administrators of the law. Unless one is willing to attribute to the Interstate Commerce Commission the lack of a reasonable purpose, as well as love of fair play and justice, and of ordinary good sense, the opposition to the "rate-making powers" contemplated in the proposed law is at once unwarranted and fallacious. Nothing but abstract dialecticism and jugglery with "transcendental" words can lead to the unreasonable conclusion that such a power over the rate will vest the commission with authority to establish the market price of a commodity or service (transportation) in an arbitrary manner and place the manufacturers of this commodity in an unfavorable position in the financial control of their properties. If, in the last instance, we must choose between a rate established by a manager, *practically* unrestricted by law, whose business and duty it is to take the railway point of view, and a rate pronounced reasonable by a body of five capable men whose highest function it is to view impartially the interests of the public *and* of the railways, there can be no mistake in accepting the judgment of the latter, especially when their judgment is subject to review by the courts and is safeguarded in every way by powers directly vested by the bill in the judiciary.

Any carrier may, within thirty days from the service of an administrative order upon it, begin, in the circuit court of the United States for the district in which its principal operating office is situated, proceedings to review such an order and the findings on which it is based. . . . The court may also, if upon an inspection of the record it plainly appears that the order proceeds upon some error of law or is unjust and unreasonable on the facts, and not otherwise, suspend the operation of the order during the pendency of the proceedings in review, or until further order of the court. Either party may appeal from the judgment or decree of the circuit court to the Supreme Court of the United States; but such appeal shall not operate to stay or supersede the order of the circuit court nor the execution of any writ or process thereon. In the Supreme Court the cause shall be given preference over all others, excepting criminal causes.

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Especial emphasis should be placed upon the promptness with which a carrier can find a remedy in the courts in case the commission should make an unjust order. For fifteen years it has taken, on the average, three or four years to get a final decision; and to assert, in the face of that fact, that the proposed law affords no adequate remedy for unreasonable orders of the commission, sounds very much like the old cry of "stop thief!" Furthermore, the commission can make no order except after a full and impartial hearing. Having all the facts before it, and having duly weighed the evidence, the commission may revise a rate fixed by the carriers in the first instance. That the commission should be incapable of properly comprehending the facts entering into a question of rates, is too preposterous to admit of discussion. And unless we are willing to believe the absurd proposition that both the commission and the federal courts can *together* not understand a rate question and decide equitably in the premises, we are compelled to admit that substantial justice will be done under the proposed law to an extent hitherto unknown — justice administered with promptness and efficiency to carriers and shippers alike and to competitive cities, harbors, productive areas and industries.

In connection with the publication of rates the most important point in the bill determines the relation of charges actually collected to the tariffs contained on sheets published and filed, a departure from the latter being in violation of law:

> Whenever any carrier files or publishes a particular rate under the provisions of this Act, or participates in any rate so filed or published, that rate, as against such carrier, its officers, or agents, in any prosecution begun under this Act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an unjust discrimination.
>
> Whenever on the trial of a defendant for a violation of this Act, such defendant is shown to have given, aided, abetted, or assisted in the giving of a rate to one or more individuals, firms, companies, or corporations different from the rate or rates fixed for such service by the tariff of rates provided for by this Act, such showing shall be deemed evidence sufficient to authorize a conviction; and it shall not be necessary on the trial of any indictment hereunder for unjust

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discrimination to allege or to prove that other and less favorable rates were offered or granted to other shippers by the defendant, or to allege or prove the names of such shippers, the true intent of this being that the published tariff shall be conclusive evidence that the rates therein prescribed were the rates charged to the general public.

Under the present law a departure from the published rate is not unlawful unless it can be shown that the degree of departure is different for different shippers. For instance, if a published rate of one dollar is assumed, and it can be shown that A secured a rate of ninety cents, the law has not been violated unless it can also be shown that B secured a rate of, say, eighty cents. In other words, departures from published rates are not discriminations unless such departures vary for different individuals, a fact which it is practically impossible to prove. While it was undoubtedly the intent of section x of the act to impose a penalty upon the corporation itself, under its peculiar phraseology, it has, however, been judicially determined that the corporation is not liable. *The agent alone can be punished.* Now the object of rate cutting is to get business and make money, and the corporation, if any one, profits by the illegal act. It is the real offender, and ought certainly, as well as its officer, to pay the penalty. It is anomalous and unjust that the representative or employee only should be liable to prosecution, while the real offender, the corporation, the principal and beneficiary in the transaction, is not. If every illegal act of that character subjected the carrier to a substantial forfeiture, so that the money result of the transaction was likely to be the other way, the inducement to commit such offenses would be greatly diminished.

In the Cullom Bill the long and short haul section appears in a radically modified state by the omission of the words "under substantially similar circumstances and conditions," thus absolutely prohibiting a greater charge for the shorter haul unless, as under the present law, the commission authorizes the same. The change will prevent violations of the long and short haul principle that are justified on the ground of competition among carriers subject to the act.

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From a theoretical point of view a single national classification of freight would be desirable, and in practice such a classification is perhaps not impossible, although the reduction of the number of classifications to three — excepting the state classifications — has greatly reduced the inconvenience and discriminations resulting from a diversity of classifications. The testimony before the Industrial Commission can scarcely be said to give very strong support to the idea of a national system; yet, that same testimony offers no strong and decisive arguments against such a system. The objection that commodities like oranges and cotton must be classified differently in different sections of the country, which would not be permitted under a national classification, is more apparent than real; for these and similar articles could be carried, as they are in part at present, at commodity rates, properly adjusted to meet the conditions of transportation in different sections of the United States. Goods carried at commodity rates constitute the bulk [146] of freight carried under the present system, and it is by no means improbable that the number of commodity rates necessary under a national system of classification would be smaller than that now in existence. The testimony is all but unanimous that commodity rates have been unduly extended. An experienced railway official of high rank stated to the writer not long ago that some day a Napoleon would arise in the railway world who would "demolish, with a heavy club," all the vast and needlessly complex classification structures, and substitute for this historical agglomeration a simple classification supplemented by a reasonable number of commodity rates. That the task of elaborating a national classification is not an easy or simple one is obvious; but that the task is not beyond the ability of men of capacity is equally obvious, and one can discover no insuperable obstacles in the way of the commission's undertaking this work in conference with railway men.[147]

[146] The great mass of articles in point of numbers, and probably also in point of gross revenue, go at class rates.

[147] It is not desirable to enter into the details of the principles and problems of classification. However, two important disadvantages inherent in the present system should not be overlooked. (1) The unjust discriminations which occur in

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The provisions of the Cullom Bill as to railway accounting are worthy of notice. The commission is given discretionary power to prescribe forms of accounts. This has already been done to a considerable extent, and much progress has been made, moreover, toward uniformity in annual reports. The commission is to have access to all accounts at all times, and may employ experts to do this work. Some railway men favor this provision, while others oppose it chiefly on the ground that it gives outsiders access to information which can be used against the road. This objection does not seem well taken unless we are again to assume lack of good judgment and fidelity in the examiner. There is no reason to suppose that the examiners will not be men of highest ability and integrity. Supervision of railway accounting may prevent improper management of stock and bond issues, a matter which past railway legislation has generally neglected; and, in addition, the inspection of accounts might become an efficient method of stopping rebates. There is, perhaps, no single feature of railway evils which is more difficult to handle than this, and even the inspection of books need not lead to an undue optimism with respect to a final solution.

The subject of agreements among railways is less adequately provided for in the Cullom Bill. If the history of competition in railway development, the world over, proves anything conclusively, it establishes the futility of competition as a workable basis of railway operation and administration. While a certain amount of competition may always persist and bring

territories where the classifications overlap each other. For instance, the Official applies to Chicago and the Mississippi River, and the Western from Chicago and the Mississippi River; and in the territory between Chicago and the Mississippi numerous complaints of injustice from different classifications of the same articles have arisen. The Official applies on traffic from Chicago to Norfolk and Richmond; the Southern applies on through traffic from Chicago to Wilmington and other Carolina cities, and wide disparities in rates to competing Carolina and Virginia towns are found to be due to this cause. (2) The inability to fix joint through tariffs on an article not classified the same in two classifications, and where the local rates are added to make the total through charge. An example is the through traffic crossing the Mississippi, on which rates east and west of that river, based on two classifications, are combined.

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about improvements in the service, speaking generally, competition in railway affairs has failed at nearly every point, and any legislation which rests upon the doctrine of competition among railways must inevitably fail. A prudent course of action would recognize the inadequacy of competition and accept a reasonable amount of freedom for carriers in making agreements among themselves, subject to the supervision of the commission. The agreements contemplated in this connection are more comprehensive than pooling arrangements, which are only a species of which the other is the genus. The history of railway pooling, however, does not afford a single forcible argument against granting to railways the privilege of coöperating in any manner which seems expedient to them, provided such coöperative arrangements are based upon contracts properly scrutinized and supervised and enforcible in the courts. Hence a provision legalizing organizations like the former Joint Traffic Association and permitting agreements among railways on the eight or more different subjects which have hitherto been the object of railway agreements, would appear to be desirable. Clearing-house arrangements should also be facilitated.

The standing which, by the Cullom Bill, is to be given in the courts to decisions and proceedings of the commission remedies one of the most unfortunate weaknesses in the present statute. Time and again the case before the court has been made, through the introduction of new facts, an entirely different one from that before the commission. The proposed law makes this impossible. "The proceedings certified from the commission, together with any additional testimony taken as above, shall constitute the record upon which the case shall be heard by the circuit court."

With respect to fines for violations of the act, a clearer distinction should, perhaps, be made between fines on the offending person and fines on the guilty corporation. It seems a gross injustice to mulct a man for doing that which corporate management may compel him to do. Personal fines may be wholesome in such cases as making false entries, under-billing, *etc.*,

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but these should not be too heavy. The bulk of the pecuniary loss following an infraction of the law should fall upon the corporation. Heavy fines, often repeated, would have an appreciable influence on dividends, and this would immediately touch the pockets of the stockholders and bondholders who, in turn, would be transformed into an army of remonstrators working towards a reduction in the number of fines, and a better observance of the law.

The inclusion in the Cullom Bill of the act in relation to testimony before the Interstate Commerce Commission, passed February 11, 1893, is a matter of convenience and does not affect anything vital in the measure.

In conclusion, the statement may be repeated that the present situation is intolerable; and that the least that can and ought to be done is to so amend the present law as to make it possible for the commission to secure an enforcement of its orders with promptness and efficiency. And in the light of the facts presented in this paper it would seem both desirable and necessary that the increase in power contemplated in the Cullom Bill should be granted. However, if Congress does not see fit to do this, it is to be hoped that an end will be put to the present delay in the execution of orders and that the unscrupulous manager will no longer be permitted to impose his code of ethics upon the great majority of conscientious and just railway officials.

The vigorous protests which have recently been made by several prominent railway officials against an increase of the powers of the commission, on the ground that the present law is adequate if only the commission will properly use the power vested in it, carry much weight because of the high standing of the authors of these protests. Yet, the writer has been unable to find any escape from the conclusions presented in the body of this paper, and nothing but an entirely new collection of facts, differing in import from those now available, could, it seems, warrant a modification of these conclusions.

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NOTE. — Since the foregoing was written two bills[1] have been introduced into Congress which practically supersede the Cullom Bill.

The House bill provides for strict adherence to the published rates, and also fines shippers for making false representations as to classification, in order to secure other than published rates. The Interstate Commerce Commission is empowered, on complaint, to determine rates, the relation of rates, classifications, *etc.*, for the future. The record of the hearings before the commission is to be accepted by the court as the basis of its findings. The bill provides for appeals, and gives the United States courts power to enforce obedience to the law and in general to exercise full legal jurisdiction.

The Senate bill likewise empowers the Interstate Commerce Commission to prescribe, in certain cases, just and reasonable rates for the future, as well as the division of rates and the limits of time during which its orders can be enforced. The rates thus prescribed are reviewable by United States courts, and may be suspended under specified conditions. The records, testimony, *etc.*, of the commission shall be accepted as *prima facie* evidence in the United States courts, and additional testimony may be taken in accordance with law. The method of appeal is also described. Agreements for the division of traffic and other species of coöperation are permitted, and the commission is empowered to investigate such pooling and other arrangements on complaint. United States courts are empowered to enforce obedience, and in the case of railways passing both through foreign countries and through the United States, traffic in the United States may be suspended on such roads in order to enforce the act. The published rates must be adhered to by both railways and shippers under prescribed penalties.

While these bills have supplanted the Cullom Bill, everything which has been said in the discussion of the latter would also have to be said in regard to the former. The content of a discussion of pending legislation would be essentially the same irrespective of the special bill to which it applies. And the historical significance of the Cullom Bill is of sufficient importance to warrant the retention of the analysis made of it in the present essay.

[1] H. R. 8337: A Bill to amend an Act entitled "An Act to Regulate Commerce," approved February 4, 1887, and all acts amendatory thereof. Introduced by Representative Corliss, and in the Senate, in identical form, by Senator Nelson.

S. 3521: A Bill to enlarge the jurisdiction and powers of the Interstate Commerce Commission. Introduced by Senator Elkins.

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WHAT HAPPENED TO THE ENGLISH PARISH.[1] II.

IV.

THE examples of Bethnal Green and Manchester — to which many others might be added — will suffice to give the reader an impression of the disjointed and confused state of local government, brought about by the uncertainty of the law and the divided jurisdiction of rival authorities. We have now to trace the development, out of this chaos, of a local government at once practicable, authoritative and moderately democratic. The most notable examples of this type or stage that we have as yet discovered are the ancient seaport of Liverpool, which at this time was rapidly growing in population and wealth, and certain of the urban districts adjacent to London, such as Woolwich, Greenwich, Chelsea and Kensington. One condition common to all these cases was the practical withdrawal — whether by abstention or absence — of any hostile interference by such authorities as the justices of the peace or the court-leet. The extra-legal constitutions thus developed varied in detail from parish to parish, but resembled each other in certain main features. They all systematized the franchise and procedure of their constituent public meetings; they all created a representative body, to which the actual administration was confided; they all developed a salaried executive staff, effectively controlled by the representative body; and this representative body itself remained intimately connected with, and genuinely dependent on, the whole body of constituents, by the medium either of authoritative public meetings or the referendum. We can best describe this later evolution of the vestry, not by taking the history of any one parish or by confining ourselves to any one decade, but by dealing separately

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with each element of the vestry organization as shown in the experience of parishes in different parts of the country prior to 1832.

The first need was the organization of the meeting of the inhabitants. The heterogeneous new populations produced an assembly radically different from the village vestry. Merchants and manufacturers, shopkeepers, beer sellers and small working craftsmen all paid rates, whilst the factory operative and the mechanic, even if unrated, were not in receipt of relief, and assumed, as independent inhabitants, the right to attend. Such a parish, we are told, became

> a kind of republic: and its common business, so far as it is conducted by majorities, is conducted as the business of a republic often is, without system, without consistency, and, therefore, without the best effect. When . . . a vestry is called, those only assemble who have there some business of their own, some point to carry, some friend to serve, or some foe to combat. . . . Much time is lost in waiting for more attendants, in trifling conversation, or in squabbling about things foreign to the subject for the sake of which the inhabitants were requested to meet; and when business is at last entered upon, want of method, or of time, or of inclination, not only prevents attention to other subjects of equal importance, and which might easily be settled while the inhabitants are together, but often no distinct resolution is formed even upon the particular question about which the meeting was called to deliberate. In many cases the company is much reduced by the departure of one or another before any general opinion can be collected. If a second meeting for the same business should be thought necessary, that meeting is probably attended by a different set of inhabitants, with different information, and different views from that which composed the first meeting; and as in many places the transactions of such meetings are not regularly committed to writing, the business is left after all to chance, or to be finally determined by two or three inhabitants who may afterwards happen to meet on the road, at the butcher's shop, at the blacksmith's, or at the shaving house; or the parties concerned are left to judge and act as well as they can for themselves.

With such a vestry there would be, every now and then, a revolt of the inhabitants against the governing clique, leading to exciting scenes at the meeting. At Greenwich in 1802, we

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find the vestry clerk concluding his record of the proceedings as follows: "And after some altercation and much confusion, so that no minutes could possibly be entered at the time, we thought it prudent and necessary to withdraw with this minute book, lest the same should be defaced and torn." What happened to a vestry clerk who failed to withdraw with his minute book, we may learn from the following resolution of the vestry of Stoke Damerel (now Devonport):

Resolved, inasmuch as it appears by the report of the Vestry Clerk of this parish that at a meeting of the parishioners held at the workhouse agreeable to order of the vestry on Wednesday evening last, that the Vestry book was forcibly and in a most outrageous manner taken from him, and the records and resolutions for nearly two years torn out and defaced, and particularly the records and resolutions founded upon the present call of Vestry: it is the opinion of this Meeting that the said last mentioned resolutions, a copy of which is now produced and identified . . . as being a true and perfect copy of the same, be adopted and resolved on by this meeting . . . and ordered to be entered accordingly.

The most obvious remedy for these disorderly scenes was the limitation of the vestry meeting to a comparatively small number of the inhabitants. Prior to 1818 it was by no means certain — it was at any rate quite unknown to the vestries themselves — what the law provided as to the franchise and the method of voting in parish matters. It was commonly assumed that every ratepayer in the parish was entitled to a vote. But it depended practically upon the churchwardens and overseers who should be assessed to the rates. It was customary to omit from the rate book all premises of low rental, on the double ground that the occupiers were themselves poor and that the collection was troublesome. And as a settlement in the parish, and perhaps a right to share in the charities, might be gained by being rated there, the parish authorities often used their discretion as to whom they would admit. Early in the eighteenth century we find the Woolwich vestry deciding

that no churchwarden or overseer for the poor do make any person whatsoever a parishioner of this parish who was not so before, by

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receiving of him or her any sum or sums of money for church or poor, without having first taken the order and direction of a vestry to be called for that purpose, such only qualified by law excepted.

The vestry then formally resolved from time to time that certain named inhabitants, "being persons of ability, credit and reputation, be and are hereby admitted parishioners of this parish, and that the churchwardens and overseers of the poor do receive their several and respective rates." Even those who were assessed to the rates were not always allowed to vote. The vestry often made a rule excluding persons in arrear with their payments, and sometimes even fixing an arbitrary minimum of rental value. The St. Pancras vestry in 1796 passed the following resolution:

Resolved, that it is the unanimous opinion of this vestry that no person ought to vote for a beadle but housekeepers renting £10 a year and rated to the poor. It is also the opinion of the vestry that persons being six months in arrear for their poor rates ought not to interfere in the election of parish officers of any description, and that the owners be requested to be particularly attentive to persons of that description coming forward to vote after the present occasion, that the payment of their rates be enforced.

Whether women ratepayers were entitled to vote was a moot point, often formally decided by resolution adversely to the ladies. Thus at St. Pancras in 1788, "it was decided by the vestry that ladies should not be admitted to vote for parish officers."

The resolutions of the vestry were decided upon by "show of hands," but if a division was demanded or an election contested, the votes were counted in one of two ways. Either the two parties would separate to different sides of the church or a primitive system of "scratching," as it was termed, would be adopted. On a page of the open minute book the names of the candidates would be written, each followed by a long line. Each voter would come up to the book in turn and "scratch," that is, make a mark across the line against his candidate's name. But a poll of the parish would often be demanded, especially for the election of a salaried officer, whether the

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vestry clerk, the beadle or the sexton or, in some cases, an organist or a curate. The voting would then extend over three or four days, with all the paraphernalia of election addresses, personal canvassing, the circulation of squibs and libels, and no little consumption of liquor. The method of election as well as the franchise was often settled by agreement among the candidates, with the sanction of the vestry. At an election to the office of parish beadle, the four candidates entered into the following agreement, which was formally ratified by the vestry: they

> do mutually agree to and with each other in the manner following, *viz.*: that the said election shall be by poll and finally closed at four o'clock in the afternoon, and that no person be permitted to vote but such as have £10 a year.

Woolwich vestry adopted, as early as 1754, a complicated system of secret ballot for all parish polls.[1]

When the vestry grew at all large the procedure of the meeting became of great importance. With regard to the chairman it was commonly assumed, though without explicit authority, that the parish clergyman had a right to preside if he was present. But the rector or vicar was often an absentee, and in the populous parishes with which we are here dealing he seems frequently to have abstained from attending any but the Easter meeting, at which the churchwardens were chosen. At other meetings the senior churchwarden or the borough reeve or constable usually presided, or the meeting elected (as it possibly had always the right to do) its own chairman. One valuable feature of the procedure was the formal notice given

[1] In 1762 this vestry made elaborate arrangements for eliminating all personal favoritism in filling the important post of organist in the parish church at a salary of £30 a year. "When the several candidates shall be in the organ loft and the curtain sowed together, the organ blower to attend them, and no person whatever to be admitted into the gallery, or any person admitted into the church, but those who are parishioners and have a right to ballot," the candidates are to cast lots for precedency in playing, and then each in succession to play a voluntary for about fifteen minutes. When all have played, the assembled parishioners (their names being duly recorded) are to declare by secret ballot which playing they prefer, the votes being there and then counted, and the successful performer to be declared elected to the post.

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to the parishioners of all the business that it was intended to transact. This notice was read out in church, and often specified in detail the subjects to be considered.

But however well organized was the vestry meeting, and however definitely settled its method of voting, the parish was dependent, for the actual execution of its public functions, upon the customary parish officers. The modern usage of making the corporate body itself responsible for the execution of particular duties was at that time unfamiliar. It was upon the various parish officers in person, not upon the vestry, that was cast the duty and responsibility of executing the various public functions; and it was these officers alone, not the inhabitants in vestry assembled, who were clothed with the coercive powers of government. But the vestry found a way to control the parish officers by its power over their accounts. At first this control was exercised chiefly through the accounts which the churchwardens were clearly bound to submit to the vestry. Thus at the beginning of the century, wherever an open vestry existed, the meeting exercised complete authority over the churchwardens' accounts, wrangling about objectionable items, emphatically forbidding particular expenditures for the future and frequently disallowing, without appeal, any outlay against which it had previously protested. How far a similar control could be legally exercised over the other parish officers was far from clear. The constable's expenditure had clearly to be allowed by the vestry; the surveyor's accounts had, it was equally plain, to be submitted to the vestry, and could therefore be discussed and disputed. It was true that nothing was said in any statute about the submission to the vestry of the overseers' expenditure on poor relief; but the churchwardens, who did submit accounts, were themselves overseers, and the overseers were expressly required to submit part of their accounts to the vestry, namely, the items relating to the constable's expenditure. Moreover, in past times, when the parish had been small, all the accounts had probably been kept together in one rude cashbook, which had been produced as a matter of course at the vestry meeting. When the growth of the parish

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business and the differentiation of officers led to the keeping of separate accounts, there was no hard and fast rule as to which account any particular item should appear in. Thus the common nuisance caused by hogs rambling about the streets is simultaneously ordered at the vestry of Woolwich to be dealt with by the surveyors of highways; at the vestry of Camberwell, by the churchwardens; and at the vestry of Bradford, by the constable, through whom it would appear in the overseers' accounts. Under these circumstances, the claim of the vestry to discuss indiscriminately all accounts seemed only reasonable.

The persons appointed as overseers, surveyors or constables were usually willing enough to fall in with the desires of the vestry by whom they had been nominated, and with whom it was more comfortable to keep on good terms. Occasionally they would stand on their legal rights. At Huddersfield, as late as 1833, we read of the surveyors of highways presenting their accounts to the vestry, but flatly refusing to allow them to be dissected by a committee which the Radical majority wished to appoint. More frequently the overseers, even if they laid their accounts before the vestry, would refuse to agree to any proposal to disallow an item, and would allege that they had acted under the direction of the justices of the peace. If the vestry considered the expenditure actually illegal, or suspected any malversation, it might threaten to appeal to the justices not to pass the accounts.[1]

The power of disallowing items in the accounts enabled the vestry to check peculation or to stop expenditure of which it disapproved, but furnished no means by which it could enforce

[1] Thus at Woolwich in 1802 it was "Resolved, that this vestry is highly dissatisfied as well with the accounts of such overseers as the same were passed, as also with the discoveries since made, and now read, of their omissions; and of the absence of Mr. Davis Bailey, although duly required to attend; and this vestry require of such overseers to give unto the vestry on Thursday next precisely at 6 o'clock in the evening a full account of, and answers to, all such questions as the vestry may then ask and require of them. And this vestry is of opinion that in case such overseers shall not comply to the wishes of this vestry, that an appeal be forthwith entered against such accounts, and such other steps be taken as may be deemed fit and advisable."

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its desires. In order to secure continuity of policy among these annually changing officers, and still more to obtain control of that policy, it was necessary for the vestry meeting to lay down definite instructions for the guidance of all who held office in the parish. Thus many vestries would, in one form or another, ordain

That none of the gentlemen hereafter chosen and appointed to the offices of churchwardens and overseers of the poor of this parish shall under any pretence whatever be permitted to serve the workhouse with provisions or any other article or commodity whatsoever, or send any materials or do any work either in or about the workhouse or otherwise on the parish account while in office.

Sometimes they would specifically forbid any expenditure on a particular service, except with the prior consent of the vestry. Thus St. Pancras objected to its officers' passion for bricks and mortar, and resolved in 1787

That no article of expenditure be allowed in the accounts of the churchwardens or overseers of the poor of this parish for the year ensuing, for any building, alteration or repair whatsoever, except the same shall have been erected or made by order of a vestry, expressly called to consider the propriety of such building, alteration or repair, by notice given in the church and chapels of this parish a fortnight at least before the assembly of such vestry.

It was, however, not until the parish business outgrew the capacity of unpaid officers, that the energetic vestry found a way of securing complete control. The most important executive officer in the pay of the parishioners was the vestry clerk, whose office was regulated by no statute, and could be made subject to any conditions that the vestry chose to impose. Already in 1715 we find the Woolwich vestry using its vestry clerk to secure knowledge and control of the doings of all the unpaid officers. The whole secretarial work and keeping of accounts was put into his hands. The vestry formally ordered him to attend not only all meetings of the vestry but also those of the churchwardens and overseers; not only to keep the minutes and draw up orders and documents for signature, but also to

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transcribe the various rates and assessments, to keep the churchwardens' accounts, to make copies of those of the overseers and even to assist in person at the monthly payment of the poor, when he was required to

> take an account of all the monthly pensioners in a book for that purpose, to set down their respective allowance, the time of their admission, their age and the causes and reasons of such their admission. And at the end of the year he shall likewise enter in the register book the names of all the parish children put out apprentice, and to whom, the names of such persons who have brought certificates removed by order of justices, [and] all bonds and other securities given to the parish.

The next step was to get a second paid officer, in the person of a "standing overseer," who was chosen by the vestry, assigned a salary payable out of the poor rate, and then submitted to the justices for formal appointment. The justices, well aware that a salaried officer had become indispensable, had practically no option in the matter, as they had no power themselves to order a salary to be paid, and the vestry would certainly object to the allowance in the accounts of a salary to any one but its own nominee. We gather that the populous townships of South Lancashire and West Yorkshire had secured what were variously termed "standing," "stationary," "perpetual" or "hireling" overseers before 1800. Such an arrangement was reported in 1817 to have been "long beneficially adopted in many populous parishes, either under a provision in local acts, or with the unanimous consent of the parishioners." Where no express provision for the appointment had been made in a local act, it seems to have been held by the lawyers that no salary could legally be paid to an overseer out of the poor rate, but it is clear that in a large number of cases no objection was made to the payment and that the justices allowed the item to pass as a matter of course in the overseers' accounts.

This transfer of the actual work of the overseers to a paid officer made the churchwardens, whom the vestry could control, the chief honorary officers of the parish, governing the administration of poor relief as well as the maintenance of the

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church. Already in 1735 we find the Woolwich vestry formally instructing the overseers not to lay out any sums without the consent of the churchwardens. They were to enter their accounts monthly and submit them to the churchwardens, and if the latter found any items which they thought objectionable, the accounts were to be forthwith brought before the vestry. Finally, there was to be a systematic examination every half year, "the first six months' accounts which have been entered in the book" being specially "brought to the churchwardens for their approbation," in order that they might "report the state thereof to the vestry."

The organization of the vestry as a democratic governing body was not complete, however, until it had learned to appoint a standing executive committee. The Elizabethan statutes contemplated that the churchwardens and overseers "shall meet together at least once every month in the church . . . after service, there to consider of some good course to be taken and of some meet order to be set down." But even where this monthly meeting of the officers had not fallen in abeyance, it could not be regarded as an executive committee of the inhabitants in vestry assembled, whose principal business was to supervise and direct those officers. The standing parish committee often grew out of the committees appointed by the vestry for special purposes, — such as the audit of accounts, action on the non-payment of rates, the erection of a workhouse, the management of the indoor poor, — which are a frequent feature of the eighteenth century minutes. These committees, recurring year after year, easily merged into a general parish committee.

But such a general committee had sometimes an independent origin. At Camberwell the earliest extant vestry minutes record, in 1674, that at

> a general meeting of the parishioners in the parish church . . . a certain number of the constant inhabitants and parishioners should be nominated and were accordingly named and chosen to meet once in every month (upon notice given) in the parish church to consult with the minister and parish officers about the affairs of the parish, and to inquire into the several gifts and legacies belonging to the

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parish, how they are disposed of, and for the better preservation of good order in the parish, and such other matters as relate to the parish, and accordingly to communicate from time to time (as occasion shall be) what they have inquired into and debated of, at such time or times there shall be a general meeting of the parishioners at the church upon notice given.

The incumbent, the three churchwardens, the three overseers and eighteen parishioners were thereupon appointed to be the parish committee, which continued to exist down to 1834. At Liversedge in 1805, after many scandals, the vestry appointed a committee of twelve persons, who agreed voluntarily to manage the parish affairs.[1] This committee met monthly to discuss all parish business and to give necessary orders to the "permanent overseer," for whom they got a salary of sixty guineas a year, deputed three of their number to attend in rotation at the paying of the poor, and evidently took the whole management into their own hands. So satisfactory had the arrangement proved that in 1818, after thirteen years' experience, the clergyman wrote a valuable little book commending the example to other parishes. In other large and populous parishes, notably Greenwich and Woolwich, we find at the beginning of the century the whole management of the church, the poor, the assessment and collection of the rates, the promoting and opposing of bills in Parliament affecting the parish and all the miscellaneous functions of the vestry in the hands of a standing executive committee, appointed by and reporting to periodical meetings of the inhabitants in vestry assembled.

But although the formation of a standing parish committee greatly increased the capacity of the vestry to manage its rapidly growing business, this committee was far from corresponding to a modern representative body. It had, to begin with, no legal status and no right to act on behalf of the

[1] "On entering upon the business of examining the accounts, it appeared that there were 4 Overseers of the Poor, 13 Surveyors of the Highways; and Churchwardens for four years, whose accounts were still unclosed," the indebtedness of the parish to these officers being about £300.

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vestry or to bind the parish by its decisions. It was, in fact, nothing more than "an advisory committee to the officers by law appointed," if these chose to accept its advice. Moreover, in the vast majority of cases the public meeting was by no means prepared to intrust the parish business, even in purely executive matters, to the committee which it had appointed. The vestry could seldom divest itself of the feeling that the function of the parish committee was merely that of drafting resolutions for the meeting of the inhabitants. Where this complete subordination was insisted on, as at Woolwich at the beginning of the century, open vestry meetings were held on an average every three weeks. In many such parishes there grew up the custom of an appeal by one party or the other from this "packed meeting" to a poll of the inhabitants, which habitually lasted for several days and was often attended by great popular excitement. In Woolwich, at any rate, the poll was developed into a systematic "referendum" on policy as well as on appointments. During the nine years from 1796 to 1804 we find it referred to a vote of the inhabitants to decide whether a rate collector should be appointed, whether an act of Parliament should be applied for, whether the master of the workhouse should have an increase of salary, whether a proposed scale of compounding for rates should be adopted, whether a certain draft bill to give increased powers of regulating the poor should be approved and whether the organist's salary should be fixed at £30 or £40 per annum.

The parish of Liverpool, coterminous with the ancient borough, which at the end of the eighteenth century was rapidly increasing in wealth and population, affords perhaps the best example of this highly developed vestry government, working under the shadow of a municipal corporation, of which the mayor and aldermen acted as justices of the peace. The student of the admirably kept and voluminous minutes of the Liverpool vestry, say from 1800 to 1818, finds the supreme authority clearly in the hands of "the inhabitants in vestry assembled," at their annual gathering on Easter Tuesday in the old St. Nicholas Church. But this general meeting did

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not attempt to carry on the executive work of so vast a parish. Besides electing two churchwardens, it appointed annually a "general committee for the management of the affairs of the parish," to which it gave formal instructions as to the policy to be pursued with regard to poor relief, assessment, the repair of the highways, the management of the churches and parliamentary business. This committee, though entirely extra-legal, united in itself all the executive authority of the vestry. Acting under its orders, the vestry clerk promoted and opposed bills, began and concluded litigation and carried on all the varied parish business of a large town. Six of its members were regularly appointed by the borough justices to fill the office of surveyor of highways, and these then acted virtually as a highways sub-committee. The principal business of the general committee accordingly was to direct and control the executive staff, which consisted of permanent salaried officers, giving up their whole time to their duties. The management of the workhouse was carried out by a paid "governor of the workhouse," assisted by a deputy governor, as well as by a master and a matron, a surgeon and a chaplain. The outdoor poor were dealt with by two salaried overseers, who were also charged with the "bastardy department." The rates (and also the taxes assessed by the government) were got in by four paid collectors. The highways were kept in repair and the commutation money and highway rate were collected by two "assistant surveyors." A leading local solicitor acted as vestry clerk, whilst the governor of the workhouse served also as parish treasurer. The accounts of these officials were gone through every month by the general committee, which then gave the necessary orders on the details of administration. Important issues of policy arising in the course of the year would be referred to a "special vestry," and an elaborate report on the affairs of the parish was presented to the annual Easter vestry.

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V.

We have now described all the principal types of government "by the inhabitants in vestry assembled" that were existing at the beginning of the nineteenth century. What proportion of the fifteen thousand vestries had advanced out of the stage of the purely rural village and "government by consent," to the chaos and anarchy of Manchester or to the comparatively efficient system of Liverpool, we are unable to ascertain. Into this diversity there came, in the year 1818, the novelty of a statutory constitution for parish government.

The legislation of 1818–19, which became inseparably connected with the name of Mr. Sturges Bourne, marks a new departure. Hitherto, though there had been much tinkering with the poor law by statute, the arrangements which any particular parish might choose to make for the management of its own business had been regarded practically as a matter to be settled by the inhabitants among themselves. The judges might set limits to parochial independence, if any parishioner chose to spend time and money on legal proceedings, in this as in any private quarrel. Moreover, if any inhabitants were sufficiently energetic and sufficiently influential, they might succeed in getting a private act of Parliament to regulate their local affairs — to organize the relief of their poor, to enclose their common fields or to maintain a turnpike road — exactly in the same way as a great landowner would get an act to settle his estate or divorce his wife. But the Sturges Bourne Acts of 1818 and 1819, besides amending the poor law, for the first time provided, as a matter of national interest, a formal and definite constitution for the parish vestry.

It is easy to trace the causes of this new departure. The parish rates, which had been steadily rising since about 1770, increased in the bad times of 1813–14 to an alarming extent. The peace of 1815 only momentarily checked the growth of expenditure, and the bad harvests of 1816–17 sent it up again by leaps and bounds. Whereas the total rates levied in England and Wales in 1785 had been a little over two millions,

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and in 1802, only five and a third millions, they rose in the bad years 1817–19 to more than ten millions, — a total that was not again reached for a quarter of a century. To the country gentlemen who then filled the House of Commons this great increase in the local expenditure, though it was counterbalanced by an equally rapid growth in the aggregate wealth of the kingdom, seemed destined to absorb the whole rental of their estates. As nearly all the local expenditure was then defrayed from the poor rate, it was upon this that Parliament concentrated its attention. The wasteful and demoralizing system of relief, about which Whitbread and others had vainly striven to interest the house in previous years, suddenly became the favorite topic. Petitions complaining of the rise of rates poured in from rural parishes. Select committees on the state of the metropolis had drawn attention to the scandals in urban districts. In 1817 a committee was appointed to consider the state of the poor laws, of which the Right Honorable William Sturges Bourne was made chairman. Before this committee there appeared as witnesses justices and clergymen, tradesmen and manufacturers, who had suffered from the chaotic inefficiency of parish government, and who had striven in various ways for its reform. Nearly all the witnesses had themselves served as overseers or were otherwise personally acquainted with the subject. The committee made an exhaustive report at the end of the session, explaining the impracticability of such remedies as fixing a maximum poor rate, finding remunerative employment for all who applied for it or reviving the ancient assessment of personalty; and recommending, instead, a reform of the machinery of poor relief, more especially of the constitution of the parish vestry. Mr. Sturges Bourne thereupon in 1818 brought in two bills, one entitled "An Act for the Regulation of Parish Vestries," which became law that session, and another, which was not passed until the following year, styled "An Act to Amend the Laws for the Relief of the Poor."

The Act of 1818, which applied compulsorily to all open vestries, made definite provision for the procedure of their meetings, prescribed the notice to be given, the arrangements

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for the chairmanship and the keeping of minutes and, above all, fixed the franchise. Persons who were not rated, or who had not actually paid their poor rates, were excluded even from being present at the meeting. Moreover — what was a most important innovation — a scale of plural voting was imposed, so that persons rated at less than £50 had one vote only, and those rated at or above that sum, one vote for every £25 up to a maximum of six. This provision was, as we shall afterwards describe, a constant source of irritation and annoyance.

The Act of 1819 contained some useful provisions amending the poor law, but its main object was to give a legal status to the parish committee and salaried overseer. It provided that any parish might, by resolution passed, after due notice, by a majority of the inhabitants in vestry assembled, nominate, for appointment by a justice of the peace, a parish committee consisting of the incumbent, the churchwardens and overseers and not less than five nor more than twenty other parishioners. This parish committee, annually elected in open vestry, in no way superseded the latter authority, but it was expressly authorized to manage all matters relating to the relief of the poor and was required to lay the minutes of its proceedings, together with a report of its work, before regular meetings of the open vestry, to be held at least twice a year. The open vestry was empowered further to elect one or more assistant overseers and to pay them such salary as was thought fit, the justices being required to appoint them formally as overseers. Finally, the overseers, whether paid or unpaid, were expressly directed to give relief only under the orders of the parish committee, except in cases of sudden emergency or by a justice's order.

This legislation proceeded, it will be seen, along the lines marked out by the spontaneous development of the best organized parishes. Unfortunately, the Act of 1819 had some serious defects. In the first place, it was held not to apply to any parish in which the administration of the poor law was governed by any local act. This at once excluded Manchester, most of the parishes in the suburbs of London and, indeed, a

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large proportion of the very parishes in which reform was most required. It did nothing, moreover, for those parishes which, for one reason or another, had lost their open vestry. Its application to any parish at all was made dependent on a vote of the open vestry, which might at any time be rescinded. The parish committee which it authorized was expressly restricted to the business of poor relief, and no provision was made for the multifarious church, highway and other business of the parish. Above all, this committee was seriously prejudiced at the outset by receiving a name — that of select vestry — which was associated in the public mind with exclusiveness, jobbery and corruption.

Notwithstanding these drawbacks, the Act of 1819 worked a beneficial result in a large number of parishes. It was almost immediately "adopted" by 2000 parishes, to which, within the next ten years, a thousand more were added. The first effect was everywhere to "tighten up" the control of the vestry over the actual disbursements of the overseer. Those parishes which had already appointed a parish committee were now able, by adopting the act, to endow that committee with legal authority over all expenditure on poor relief. Thus at Charlton, where the act had been instantly adopted, the minutes of the select vestry inform us that

> having read that part of the Act of the 31st. of March 1819, for the better regulating the relief of the poor, (they) resolved that the Overseers do, the next day of meeting, produce a list of the persons receiving relief, stating, as far as they know, the condition and character of each, also stating each person's weekly relief; secondly, to produce an account of money in hand, also what further sum is likely to be wanted; thirdly, to produce a list of defaulters upon the poor's rates.

A fortnight later the select vestry summoned all the poor to pass before them, and "having maturely considered each individual case," they instructed the overseers exactly what sums to allow to each pauper. The result was naturally a quarrel with the "respectable inhabitant" on whom had been cast the onerous and unpaid office of overseer.

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At Liverpool the act came in the nick of time to prevent the break-up of the elaborate extra-legal constitution that we have described. So long as the honorary parish officers worked in harmony with the parish committee all went well. But in 1817 the vestry had the misfortune to elect as churchwarden an ambitious and self-opinionated man named Dennison, who flatly refused to consult the parish committee or to carry out its wishes, altered the parish assessments as he chose and arbitrarily expended over £2000 in ornamenting the parish churches. The parish committee appealed to the vestry, who resolved

> that this vestry views with alarm the invasion made upon their ancient privilege of appointing a committee for the management of the affairs of the parish, by the disgraceful conduct of Mr. John Dennison, one of the churchwardens, in dismissing and refusing to consult the committee appointed at the last annual vestry.

Fortunately, the justices of the peace supported the vestry and disallowed Dennison's portion of the overseers' accounts. The adoption of the Act of 1819 put the parish committee on a legal footing as a select vestry, so far, at any rate, as expenditure on poor relief was concerned, and secured, in practice, its authority in all parish matters. For about ten years this constitution gave the parish a peaceful and comparatively efficient administration. From 1821 onward we see the select vestry vigorously overhauling the assessment of the parish and the collection of the rates ("not one-fourth of dwelling houses pay to the poor rates . . . whole streets have been passed over year by year, illegally, at the option of the parish officers"). We watch their constant struggle to enforce a wisely stringent limitation of the swollen lists of the outdoor poor, offering freely the test of "the house"; we follow them in their intelligent, if not always successful, experiments in workhouse administration.

Meanwhile the Act of 1818, which regulated the voting and procedure of all open vestries, was being made use of, in one populous parish after another, in a way that Mr. Sturges

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Bourne had failed to foresee. He had intended to restrict and moderate the public meeting of inhabitants by excluding non-ratepayers and by giving a preponderating weight to such of the wealthier citizens as were present. What his act really accomplished was the establishment of the "referendum," and even the "initiative," as a regular part of the parish constitution. In the mass meetings that were beginning to take place in the churches of Manchester and Liverpool it proved quite impossible to identify as a ratepayer every one who presented himself, still less to ascertain, when the resolution was put to the meeting, how many votes each person present was entitled to cast. Moreover, the rapid growth of population, the increasing divergence of the different social classes in wealth and interests and the growing political activity of the various sections, all contributed to bring the crowds that thronged the vestry meetings out of harmony with the governing classes of the town. To get more accurately at the sense of the parish a few parishes had long been accustomed to take a poll on questions of policy as well as on appointments. Though Sturges Bourne's Act contained no reference to a poll, it was quickly found impracticable to make use of the graduated scale of voting except by taking the votes one by one, which made a poll inevitable. Thus, just at a moment of growing political excitement, that which prior to 1818 had been a feature of only a few parishes suddenly became an incident of every crowded vestry. Any section outvoted at the meeting immediately claimed a poll of the parish, and this had to be granted as a matter of legal right. As the wealthier classes abstained from attending the public meeting and, moreover, had most to gain by the strict counting of the plural votes, it was usually the Tories who demanded this referendum, and the Radicals who objected to it.

This unpremeditated experiment in the use of the referendum — handicapped as it was by every unfavorable circumstance — practically nullified all that was useful in the Sturges Bourne legislation. Even at Liverpool, where Toryism and the Church of England dominated the workingmen as well as the

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upper classes, we see from 1828 onward a constantly increasing number of appeals from the vestry meeting to the poll. In one year (1832) no fewer than eight of these referendums were taken, on such questions as the amount of salary to be paid to an official, the election of churchwardens and sidesmen, the assessment of the owners of cottage property and the passing of the churchwardens' accounts. The active spirits who, in the heated years of the Reform controversy, carried the open vestry meetings were habitually defeated at the poll. They revenged themselves on the Tory party by turning the half-yearly meeting at the old parish church into a pandemonium.

> We hardly ever remember [remarks a local newspaper] to have seen a more numerous or a more stormy meeting of the kind, or one of longer duration. . . . The proceedings commenced a few minutes after six, and during the greater portion of that time the scene of angry bickerings and recriminations presented was one which contrasted strangely with the character of the building in which the meeting was held.

The demand for a poll was the signal for redoubled uproar, increased by hissing and cries of "no poll." Though the select vestry managed to hold its own at these polls, it found them so burdensome that it vainly appealed to the meeting to make them unnecessary, declaring "that the public service of the parish has sustained great inconvenience from the frequency with which the collectors have been taken from their ordinary duties from their attendance being required at different polls." At Manchester, in these same years, every open vestry became the scene of angry recriminations as to the right of the borough reeve, or other chairman, to declare the meeting adjourned for the purpose of taking a poll, and as to whether or not the scale of plural voting applied to that town. At a vestry meeting in 1832 the demand for a poll led to something like a riot. "Some of the orators," reported the *Manchester Guardian*, "expressed their belief that one of the first acts of a reformed Parliament would be to repeal 'Sturges Bourne's' infamous 'Hact.'"

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VI.

We may now sum up the various developments of the open vestry from 1660 to 1835, as seen in the minutes of its proceedings and contemporary accounts of its structure.

The great majority of parishes — practically the whole of rural England — continued to be governed by little oligarchies, consisting of the small group in each village who alone paid rates, — the squire, the incumbent, the half-dozen farmers, the innkeeper or miller and possibly one or two small freeholders or shopkeepers. The economic and social relations which bound these principal inhabitants to one another far outweighed in importance their official relations as justice of the peace, incumbent and parish officer, whilst the remainder of the scanty population were, broadly speaking, their unenfranchised dependents. The public revenue of each little community was raised and spent by the common consent of all who contributed to it, and the administration of the parish affairs — the relief of the poor, the maintenance of the church and the repair of the roads — was conducted by themselves in person, according to their own wishes, with as much or as little wisdom as each group possessed.

In the new England that was springing up in certain districts, owing to the increase of foreign trade and the "industrial revolution," the decay or total absence of the old social order left the legal framework of the parish bare and revealed its inadequacy as a local governing constitution. There was, indeed, no one legal framework; every parish had three or four — derived from custom and common law, from the ecclesiastical canons, from statute law — superposed one on the other at different dates and creating inconsistent relationships. Whilst every parish officer was responsible to manifold and inconsistent authorities, there was no supreme power and no coördination of jurisdictions. Most important of all, a constitution which provided no organs of administration but onerous unpaid offices, in which service was compulsory, together with an unorganized public meeting, lacked, for populous

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urban districts, the elementary requisites of government. Hence the stage of chaos in which we find nearly every populous parish.

In some of these districts in which, from one cause or another, the open vestry was allowed to constitute itself the supreme authority, there grew up an extra-legal constitution, consisting of a regulated public meeting, a representative executive committee and a staff of salaried officers. In one or two of these we find this constitution supplemented by the use of the referendum. Where this extra-legal constitution was allowed to work, it produced an interesting and reasonably well-ordered experiment in democratic local government, uncontrolled and uninspired by any other part of the community.

The Sturges Bourne legislation of 1818–19, ignored by practically all the rural parishes, had on populous districts a twofold effect. The permissive sections of the Act of 1819 provided a legal basis for the extra-legal constitution which had grown up in some parishes and enabled two or three thousand others to equip themselves with a representative executive and salaried staff. The compulsory introduction, by the Act of 1818, of the plural vote into the public meeting had the unforeseen result, in most populous parishes, of establishing what virtually amounted to the referendum and the initiative as the basis of parish government. This introduction of an unregulated system of popular voting, on policy as well as on appointments, at a time of great political and sectarian excitement served only to increase, between 1829 and 1835, the instability and confusion of parish government. Upon this state of instability and confusion there came the Poor Law Amendment Act of 1834 and the Municipal Corporations Act of 1835, which, though not expressly reforming parish government as such, provided two clearly defined and elaborately organized representative bodies — the Board of Guardians and the Town Council — into whose hands the bulk of local government eventually passed.

SIDNEY AND BEATRICE WEBB.

LONDON, ENGLAND.

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THE SCIENTIFIC BASIS OF IMPERIALISM.

I.

THOUGH it can hardly be denied that the ambitions of individuals or nations have been the chief conscious motives in imperialism, it is possible to maintain that here, as in other departments of human history, certain large hidden forces operate for the progress of humanity.

The powerful hold which biological conceptions have obtained over the pioneers in the science of sociology is easily intelligible. It is only natural that the laws of individual and specific progress, so clearly discerned in other parts of the animal kingdom, should be rigorously applied to man; it is not unnatural that the deflections or reversals of the laws of lower life by certain other laws, which attain importance only on the higher psychical levels of the *genus homo*, should be underrated, misinterpreted or ignored.

The biologist who enters human history often finds himself confronted by intellectual antagonists, who regard him as an interloper and seek to raise a barrier between human and animal development. Indeed, from the ranks of the biological profession itself, scientists of such eminence as Huxley and A. R. Wallace have lent themselves to this separatism, distinguishing the ethical or spiritual progress of the human race from the general cosmic process, and endowing men with qualities and with laws of action different in kind from those which obtain in the rest of the animal kingdom.

A reaction against the abrupt dogmatism of this position has led many others to an equally abrupt and equally dogmatic assertion that the laws of the lower forms of physical struggle and selection, which explain or describe progress in lower animals, are sufficient for all purposes of sociology. Sociologists have in some cases shown themselves eager to accept this

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view, and have applied it to defend the necessity, the utility, and even the righteousness of maintaining to the point of complete subjugation or extermination the physical struggle between races and types of civilization. Admitting that the efficiency for combat of a nation or a race requires a suspension of intestine struggle, at any rate in its most intense form, the crude struggle on the larger plane, it is held, must be maintained. This serves, indeed, two related purposes. A constant struggle with other races or nations is demanded for the maintenance and progress of a given race or nation; abate the necessity of this struggle and the vigor of the race flags and perishes. Thus it is to the real interest of a vigorous race to be "kept up to a high pitch of external efficiency by contest, chiefly by way of war with inferior races, and with equal races by the struggle for trade routes and for the sources of raw material and of food supply." "This," adds Professor Karl Pearson, "is the natural-history view of mankind, and I do not think you can in its main features subvert it."[1]

Other philosophers, taking the wider cosmic standpoint, insist that the progress of humanity itself requires the maintenance of a selective and destructive struggle between races which embody different powers and capacities, different types of civilization. It is desirable that the earth should be peopled, governed and developed as far as possible by the races which can do their work best, that is, by the races of highest "social efficiency"; these races must assert their right by conquering, ousting, subjugating or extinguishing races of lower social efficiency. The good of the world, the true cause of humanity, demands that this struggle — physical, industrial, political — continue until an ideal goal is reached, where the nations of greatest social efficiency rule the earth, in accordance with the several kinds and degrees of this quality which they manifest. This principle is clearly enunciated by M. Edmond Demolins, who describes it as being "as indisputable as the law of gravitation."

When one race shows itself superior to another in the various externals of domestic life, it *inevitably* in the long run gets the upper

[1] National Life from the Standpoint of Science (Black, 1900), p. 44.

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hand in public life and establishes its predominance. Whether this predominance is asserted by peaceable means or feats of arms, it is none the less, when the proper time comes, officially established, and afterwards universally acknowledged. I have said that this law is the only thing which accounts for the history of the human race and the revolutions of empires, and that, moreover, it explains and justifies the appropriation by Europeans of territories in Asia, Africa and Oceanica and the whole of our colonial development.[1]

The western European nations, with their colonies, represent in various degrees the socially efficient nations. Some American and English writers, such as Professor Giddings and Mr. Kidd, believe that the Teutonic races, and in particular the Anglo-Saxon branches, represent the highest order of efficiency, in which notion they are supported by a little group of Anglophil Frenchmen.

This genuine and confident conviction of our "social efficiency" must be taken as the chief moral support of imperialism. Human progress requires the maintenance of the race struggle, in which the weakest races go under while the socially efficient races survive and flourish; we are a socially efficient race. So runs the imperialist argument.

When the argument is thus concisely stated, the meaning of the term "socially efficient" becomes evident. It is simply the antithesis of "weak," and is equivalent to "strong in the struggle of life." At first sight it suggests moral and intellectual virtues of some broad general kind, and afterwards it is taken to imply such qualities. But in the "natural-history" sense which we are at present considering it signifies nothing more or less than capacity to beat other races, which, from their failure, are spoken of as "lower." It is merely a different form of the phrase "survival of the fittest," the meaning of which is clear when the question is put: "Fittest to do what?" and the answer follows: "Fittest to survive."

Giving then the proper value to the terms, the view of human progress simply comes to this: "In the history of man, as throughout nature, stronger races have continually trampled

[1] Boers or British, p. 24.

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down, enslaved and extinguished other races." The biologist says: "This is so deeply rooted in nature, including human nature, that it must go on." He adds: "It has been the prime condition and mode of progress in the past, therefore it is desirable and should go on. It must go on, it ought to go on." So easily do we glide from natural history to ethics, and find in utility a moral sanction for the race struggle.

Now imperialism is nothing but this natural-history doctrine regarded from the standpoint of one's own nation. We represent the socially efficient nation; we have conquered and acquired dominion and territory in the past: we must go on; it is our destiny — one which is serviceable to ourselves and to the world — our duty. Thus emerging from natural history, the doctrine soon takes on a large complexity of ethical and religious finery, and we are wafted into an elevated atmosphere of "imperial Christianity," a "mission of civilization," in which we are to teach the arts of good government and the dignity of labor.

That the power to do anything constitutes a right and even a duty to do it, is perhaps the commonest, the most "natural," of temperamental fallacies. Even Professor Pearson does not avoid it, when, after an able vindication of the necessity of intra-race selection and of race struggle, he speaks of "our right to work the unutilised resources of earth, be they in Africa or in Asia."[1] This belief in a divine right of force, which teachers like Carlyle, Kingsley, Ruskin did so much to foster, is primarily responsible for the transmutation of a law of natural history into a moral enthusiasm.

Elsewhere I have dwelt with so much insistence on the more sordid and calculating motives which direct the imperialistic movement that I am anxious here to do justice to the nobler aspects of the sentiment of imperialism interpreted through a naïve rendering of science into a gospel of arduous chivalry. These are revealed in the charming nature and buoyant career of Hubert Hervey, of the British South Africa Chartered Company, as described by his fellow-adventurer, Earl Grey.

[1] National Life, p. 46.

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Here we have imperialism at its best in action, and, what is better for our purpose, a most ingenuous and instructive attempt to set forth the gist of the imperialist philosophy.

Probably every one would agree that an Englishman would be right in considering his way of looking at the world and at life better than that of the Maori or Hottentot, and no one will object in the abstract to England doing her best to impose her better and higher view on those savages. But the same idea will carry you much further. In so far as an Englishman differs in essentials from a Swede or Belgian, he believes that he represents a more perfectly developed standard of general excellence. . . . Yes, and even those nations nearest to us in mind and sentiment — German and Scandinavian — we regard on the whole as not so excellent as ourselves, comparing their typical characteristics with ours. Were this not so our energies would be directed to becoming what they are. Without doing this, however, we may well endeavour to pick out their best qualities and add them to ours, believing that our compound will be superior to the foreign stock. It is the mark of an independent nation that it should feel thus. How far such a feeling is, in any particular case, justified, history alone decides. But it is essential that each claimant for the first place should put forward his whole energy to prove his right. This is the moral justification for international strife, and for war, and a great change must come over the world and over men's minds before there can be any question of everlasting universal peace in the settlement of all international differences by arbitration. More especially must the difficulty caused by the absence of a generally recognised standard of justice be felt in the case of contact between civilised and uncivilised races. Is there any likelihood of the gulf between the white and the black man being bridged within any period of time that we can foresee? Can there be any doubt that the white man must and will impose his superior civilisation on the coloured races? The rivalry of the principal European countries in extending their influence over other continents should lead naturally to the evolution of the highest attainable type of government of subject races by the superior qualities of their rulers.[1]

Here is the undiluted gospel of imperialism; the fact of physical struggle between white races, the fact of white subjugation of lower races, the necessity based upon these facts, the

[1] Memoir of Hubert Hervey, by Earl Grey (Arnold, 1899).

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utility based upon the necessity and the right or duty based upon the utility. As a statement of the best spirit of imperialism it is not to be bettered. The Englishman believes he is a more excellent type than any other man; he believes that he is better able to assimilate any special virtues others may have; he believes that this character gives him a right to rule which no other can possess. Mr. Hervey admits that the patriotic Frenchman, the German, the Russian feels in the same way his sense of superiority and the rights it confers on him; so much the better (and here Mr. Hervey is in line with Professor Pearson), for this cross conviction and these cross interests intensify the struggle of white races and ensure the survival and progressive fitness of the fittest.

So long as we regard this imperialism exclusively from the standpoint of the English, or any other single nation, its full rationale escapes us. It is essential to the maintenance of that struggle of nations which is to quicken vigor and select the fittest or most efficient that each competitor shall be stimulated to put forth his fullest effort by the same feelings regarding the superiority, the destiny, the rights and imperial duties of his country as the English imperialist entertains regarding England. And this is just what we seem to find. The Englishman is genuinely confident of the superior fitness of England for any work she may essay in the civilization of the world. This is the supreme principle of the imperialist statesmen, well expressed in Lord Rosebery's description of the British empire as "the greatest secular agency for good the world has ever seen." Of the superior competence of Englishmen for all purposes of government, quite irrespective of climatic, racial or any other conditions, there is no touch of doubt in the average man. "Why, I suppose you imagine we could undertake to govern France better than Frenchmen can govern her," I heard put as an ironical poser in a discussion on British capacity. The triumphant retort, "Why, of course I do," was no rhetorical paradox, but a perfectly genuine expression of the real conviction of most Englishmen. Now the French chauvinist, the German colonialist, the Russian

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pan-Slavist, the new American expansionist, each entertains the same general conviction, with the same intensity, regarding the capacity, the destiny, the rights of his own nation; these feelings have perhaps come more clearly into the forefront of national consciousness with the British than with any other nation, but events are rapidly educating the same imperial aspirations in all our chief industrial and political competitors.

In our own day Victor Hugo declares France "the saviour of nations" and bursts out "Non, France, l'univers a besoin que tu vives. Je le redis, la France est un besoin des hommes." Villari, echoing the illustrious Gioberti, claims for Italy the primacy among nations. The Kaiser tells his people, "Der alte gute Gott has always been on our side." M. Podbyedonostseff points to the freedom of Russia from the shibboleths of a decadent civilisation, and looks to the young and vigorous Slavonic stock as the residuary legatee of the treasures and conquests of the past. The Americans are not less confident than in the days of Martin Chuzzlewit, that it is their mission to "run this globe."[1]

Nor are these barren sentiments; in various parts of the world they are inspiring young soldiers and politicians and missionaries to a practical direction of the resources of France, Germany, Italy, Russia, the United States towards territorial expansion.

II.

We are now in a position to restate and test the scientific basis of imperialism regarded as a world policy. It is held that the maintenance of a military and industrial struggle for life and wealth among nations is desirable in order to quicken the vigor and social efficiency of the several competitors, and so to furnish a natural process of selection, which shall give an ever larger and intenser control over the government and the economic exploitation of the world into the hands of the nation or nations representing the highest standard of civilization or social efficiency, and which, by the elimination or subjugation of the inefficient, shall raise the standard of the government of humanity.

[1] G. P. Gooch, The Heart of the Empire, p. 333.

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This statement withdraws the issue from the purely national-political and from the distinctively ethical standpoint, and refers it back to a scientific basis in the laws or analogies of biology.

Here we can profitably start from a statement of Professor K. Pearson:

> History shows me one way, and one way only, in which a high state of civilisation has been produced, namely, the struggle of race with race, and the survival of a physically and mentally fitter race. If you want to know whether the lower races of man can evolve a higher type, I fear the only course is to leave them to fight it out among themselves, and even then the struggle for existence between individual and individual, between tribe and tribe, may not be supported by that physical selection due to a particular climate, on which probably so much of the Aryan's success depended.

Assuming that this is a true account of the evolution of civilization during the past, is it essential that the same methods of selection must dominate the future? Are there no forces that have been coming into play during the later periods of human history which deeply modify, suspend and even reverse the operation of selective forces that dominate the rest of nature?

In the very work from which I quote, Professor Pearson furnishes a complete answer to his own contention for the necessity of this physical struggle between races. In the last sentence of the passage quoted he seems to recognize the utility in lower races of the physical struggle for life between individuals in the same tribe. But his general position as a socialist is very different. In order that a tribe, a nation or other society may be able to compete successfully with another society, the individual struggle for life within the society itself must be suspended. The competitive vigor, the social efficiency, of the nation requires a saving of the friction of individual competition for life or for the means of life. Now this is in itself a reversal of the generally recognized law of progress throughout the animal world, in which the struggle for food and other livelihood is held to be essential to the progress of the species, and that, too, though every

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species is engaged in more or less direct competition for food, *etc.*, with other species. Coöperation, social solidarity, is indeed recognized as an adjunct of progress in many of the higher species, but the struggle between individuals for a restricted supply of food or other necessaries is maintained as a leading instrument of progress by rejection of the physically unfit.

Professor Pearson justly recognizes and boldly admits the danger which attends the humanitarianism that has in large measure suspended the "struggle for life" among individuals, inciting modern civilized nations to insure to all individuals born in their midst the food, shelter and other necessaries enabling them to grow to maturity and to propagate their kind. He sees quite clearly that this mere suspension of the individual struggle for life not only is not essential to the solidarity and efficiency of the nation, but even positively impairs its virtues by burdening society with a horde of physical and moral weaklings who would have been eliminated under earlier forms of the struggle for life. He rightly enforces the doctrine that a nation which is reproduced from its bad stock more than from its better stock is doomed to deterioration of physique and morale. It is as essential to the progress of man as to that of any other animal, as essential in the future as in the past, that reproduction shall be from the better stock, and that the worst stock shall be eliminated. Humanitarianism and the sense of social solidarity by no means require or even admit that this condition should be sacrificed; they merely impose new methods on the process of selection.

Irrational nature selects wastefully and with the maximum of pain and misery, requiring innumerable individuals to be born, in order that they may struggle and perish. Rational humanity would economize and humanize the struggle, by substituting a rational social test of parenthood for the destruction of children by starvation, disease or weakness. To prevent reproduction from bad stock, however difficult and dangerous it may be, is obviously the first duty of an organized society, acting alike in its own self-defense and for the interests of its individual members. It is not necessary for the safety and

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progress of society that "unfit" children should die; it is necessary that they should not be born, and ultimately the society which prospers most in the character of its members will be the one which best fulfills this preventive duty.

Yet when Professor Pearson passes from a society of individuals to the society of nations which we call humanity, he insists upon retaining the older, cruder, irrational method of securing progress, — the primitive struggle for physical existence. Why? If it is profitable and consonant with progress to put down the primitive struggle for life among individuals with one another, to suppress the family and tribal feuds which survive even in fairly developed societies and to enlarge the area of social internal peace until it covers a whole nation, may we not go further and seek, with hope, to establish international peace and coöperation, first among the more civilized and more nearly related nations, and finally for the complete society of the human race? If progress is served by substituting rational selection for the older physical struggle, first within small groups and then within the larger national groups, why may we not extend the same mode of progress to a federation of European states, and finally to a world federation? I am not now concerned with the grave practical difficulties besetting such an achievement, but with the scientific theory.

Although a certain sort of individual efficiency is sacrificed by repressing private war within a tribe or nation, it is rightly judged that the gain in tribal or national unity and efficiency outweighs that loss. May not a similar biological and rational economy be subserved by substituting government for anarchy among nations? We admit that a nation is strengthened by putting down internecine tribal warfare; what finality attaches to the social grouping we term a nation which obliges us to reverse the economy applicable to tribes when we come to deal with nations?

III.

Two objections are raised against this idea of internationalism. One is historical in its nature; it consists in a denial that "a society of nations" does or can exist at the present

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time or in that future which concerns us. The physical and psychical relations which exist between nations, it is urged, have no real analogy with those existing between individuals or tribes within a nation. Society is dependent on a certain homogeneity of character, interests and sympathies in those who form it. In the ancient world this was seldom found of sufficient strength save among close neighbors, and the city state was the true social type; the actual and possible relations of these city states with one another were commonly those of war, modified by transitory compacts which rarely led to any truly national unity. In such a condition close-welded coöperation of citizens was essential as a condition of civic survival and progress; and a struggle for life between the several city states was a means of progress in accordance with the biological law. The nation state stands now where the city state stood in ancient Greece or mediæval Italy; there remains the same historical and even ethical necessity to retain the struggle between nations now as there was in earlier times to retain the struggle between cities.

Social psychologists attempt to fortify this position by emphasis upon the primary psychical condition of a national life. The possible area of a genuine society, a nation, is determined by the extension of a "consciousness of kind" — an "ethical like-mindedness."[1] This may be applied as a limiting condition by a "little Englander," or as a principle to justify imperial expansion, according to the quantity and quality of like-mindedness that is taken as the basis of social unity in a nation or an empire. The most precise statement of this doctrine in its application as a barrier to ethical and political internationalism is that of Dr. Bosanquet: "The Nation State is the widest organisation which has the common experience necessary to found a common life."[2] He carries the finality of the national type of society so far as virtually to repudiate the ethical fact and the utility of the common conception of humanity.

[1] Giddings, Democracy and Empire, pp. 10–51.
[2] The Philosophical Theory of the State, p. 320.

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According to the current ideas of our civilisation, a great part of the lives which are being lived and have been lived by mankind are not lives worth living, in the sense of embodying qualities for which life seems valuable to us. This being so, it seems to follow that the object of *our ethical idea of humanity is not really mankind as a single community.* Putting aside the impossibilities arising from succession in time, we see that no such identical experience can be pre-supposed in all mankind as is necessary to effective membership of a common society and exercise of a general will.[1]

Though a subtle qualification follows, based on the duty of states to recognize humanity, not as a fact but as a type of life, "and in accordance with it to recognise and deal with the rights of alien individuals and communities," the real upshot of this line of thought is to emphasize the ethical sovereignty of a nation and to deny the validity of any practical standard of the conduct of nations towards one another, at any rate so far as the relations between "higher" and "lower," eastern and western, nations are concerned.

This view is stoutly supported by some sociologists and statesmen from the juridical standpoint. There can be, we are told, no real rights of nations because there exists no sanction, no recognized tribunal to define and enforce rights. The legal rigor of this position I am not greatly concerned to question. It may here suffice to say that the maintenance under ordinary conditions of treaty relations, international credit and exchange, a common postal and, within narrower limits, a common railway system, not to mention the actual machinery of conventions and conferences for concerted international action and the whole unwritten law of war and international courtesies, embassies, consulates and the like — all these things rest upon a basis of recognition of reciprocal duties, the neglect or violation of which would be punished by forfeiture of treatment as "most favoured nations" in the future, and by the reprobation and the possibly combined intervention of other states. We have here at least a real beginning of effective international federation, with the rudiments of legal sanction for the establishment and enforcement of rights.

[1] The Philosophical Theory of the State, p. 329.

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The studied ignoring of these vital facts in the more recent statecraft and the reversion alike of legal theorists and of "high politicians" of the Bismarck school to a nationalism which emphasizes the exclusive rather than the inclusive aspect of patriotism and assumes the antagonism of nations as an all-important and a final fact, is the most dangerous and discreditable factor of modern politics. This conduct in politics, and in no small degree its defense among political theorists, may be in part explained through analysis of the economic driving forces. This reveals certain sectional interests and orders within the nation usurping the national will and enforcing their private interests, which rest upon international antagonism, to the detriment of the national interest, which is identical with that of other nations.

This obstinate halt in the evolution of social relations at the limit of political nationality now reached will be recognized by the future historian as the most difficult of all present-day political phenomena to explain. The community of interests between nations is so great, so multifarious and so obvious, the waste, pain and damage of conflicts are so gross and palpable, that to those who do not understand the strong sectional control in every modern state it may well appear that some natural barriers of race, boundaries or color make impossible any real extension of "society" beyond the area of nationality.

But to ascribe finality to nationalism upon the ground that members of different nations lack "the common experience necessary to found a common life" is a very arbitrary reading of modern history. Taking the most inward meaning of "experience," the meaning which gives most importance to the racial and traditional characters that mark differences of nationality, we are obliged to admit that the fund of experience common to peoples of different nationality is growing with great rapidity under the numerous, swift and accurate modes of intercommunication which mark the latest phases of civilization. It is surely true that the dwellers in large towns in all the most advanced European states, an ever-growing proportion of the total population, have, not merely in the externals but

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in the chief formative influences of their lives — their reading, their art, their science, their recreation — a larger community of experience than existed a century ago among the more distant members of any European nation, whether dwelling in country or in town. Direct intercommunication of persons, goods and information is so widely extended and so rapidly advancing that this growth of "the common experience necessary to found a common life" beyond the area of nationality is surely the most markworthy feature of the age. Making, then, every due allowance for the subjective factors of national character which temper or transmute the same external phenomena, there surely exists, at any rate among the more conscious and more educated sections of the chief European nations, a degree of true "like-mindedness" which forms the psychical basis of some rudimentary internationalism in the field of politics. Indeed it is curious and instructive to observe that, while some of those most insistent upon like-mindedness and common experience as the tests of a true social area apply them in defense of existing nationalities and in repudiation of attempts to absorb alien nationalities, others, like Professor Giddings, apply them in the advocacy of expansion and imperialism.

But as between the policy of national independence on the one hand, and on the other the right of conquest, by which "the more efficient nation" subjugates and absorbs the less efficient, there is surely a third alternative, namely, experimental and progressive federation which, proceeding on the line of greatest common experience, shall develop formal bonds of political attachment between the most like-minded nations, extending them to others, as common experience grows wider, until an effective political federation is established comprising the whole of "the civilized world," that is, all those nations which have attained a considerable fund of the common experience that is comprised under the head of civilization. This idea does not conflict with the preservation of what is really essential and valuable in nationalism, nor does it imply a suspension or abolition of all forms of struggle by which the true

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personality of a nation may express itself, in industry, in art or literature.

If it be objected that the requisite amount of like-mindedness or common experience does not exist even among the nations most subject to modern assimilative influences, that the forces of racial and national antagonism even there preclude any truly effective union, I can only repeat that this is a matter for experiment, and that the experiment has never been tried. Racial and national antagonisms have been so fed, fostered and inflamed for the class and personal ends and interests which have controlled politics that the deeper underlying sympathies and community of different peoples have never been permitted free expression, much less political assertion. The most potent and pervasive forces in the industrial, intellectual and moral life of most European races, so far as the masses of the peoples are concerned, have so rapidly and closely assimilated during the last century as of necessity to furnish a large common body of thought and feeling, interests and aspirations, which are a "soul" for internationalism. The main economic conditions affecting the working life of the masses of the peoples, both in town and country on the one hand, and, on the other, the matter and methods of education through the school, the church and the press, show features of similarity so much stronger and more numerous than those of difference as to make it a safe assertion that the peoples of Europe are far closer akin in present sympathy than their governments, and that this sympathy is already strong enough to furnish a solid and stable foundation for political federal institutions, if only the obstruction of class governments could be broken down and the real will of the peoples set in the seat of authority. To take the commonest of concrete instances, it is at least probable that the body of the workers in different countries who fight and pay for wars would refuse to fight and pay in the future if they were allowed to understand the real nature of the issues used to inflame them and to determine them.

If this view is correct, the mere fact that wars still occur and that national animosities are continually flaring up must

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not be taken as valid evidence that sufficient common sympathy and experience do not exist between the different nations to render impossible a suppression of physical conflict and the political machinery required to maintain peace.

And, on the other hand, it is not necessary to exaggerate the extent of this international community of interests. If any considerable amount of real community exists, it furnishes the spirit which should and might inform a body of political institutions. Here is the significance of The Hague Conference, alike in its success and its failure. Its success — the mere fact that it was held and the permanent nucleus of internationalism created — attests a real and conscious identity of interests among different nations in the maintenance of peace; its failure and the open derision expressed by many politicians merely indicate the presence in high places of cliques and classes opposed in their interests and feelings to those of the peoples, and the necessity of dethroning these enemies of the people if the new cause of internationalism is to advance. Secure popular government, in substance and in form, and you secure internationalism; retain class government, you retain militant imperialism and international conflicts.

IV.

In following out the psychical argument for regarding nations as final social areas I seem to have wandered very far from the biological basis, — the necessity of maintaining conflicts between nations for purposes of natural selection. In reality I have come round precisely to the point of divergence. Assuming it were possible to enthrone the will of the peoples and so to secure institutions of internationalism with a suspension of war, would the individuality of a nation perish? Would the nation lose vigor, become less efficient and perish? Is the maintenance of physical conflict essential to the natural selection of nations?

Turn again to the suspension of the cruder physical struggle which takes place in the evolution of tribal or national solidarity. As such national organization becomes stronger and

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more skillful, the ravages of intestine strife, starvation and certain diseases cease to be selective instruments, and the kind of individual fitness which was tested by them is superseded; the vast expenditure of individual energy formerly engaged in protecting life and in securing necessaries of life is reduced to insignificant dimensions: but the struggle for individual life is not abated, it is simply shifted on to higher planes of life than are implied in bare animal existence, nourishment and propagation. Instead of struggling for these simpler vital ends, individuals now struggle, with all the extra energy spared from the earlier struggles, for the ends of an enlarged and more complex life — for comfort and wealth, for place and personal honor, for skill, knowledge, character and ever higher forms of self-expression, and for services to their fellow men with whom they have identified themselves in that expanded individuality which we term altruism or public spirit.

Individuality does not suffer, but greatly gains, by the suppression of the lower struggle; there is more energy, greater scope for its expression, a wider field of close competitors, and higher and more varied forms of fitness are evoked and tested. It is not even true that the struggle ceases to be physical; the strain and the support of the higher forms of struggle, even on the topmost intellectual and moral planes, are largely physical; the health and nervous energy which take part in the struggles of the legal or literary professions, or on any intellectual arena, are chief requisites, if not the supreme determinant, of success. In all the higher forms of struggle an elimination of the physically unfit is still maintained, though the criteria of physical unfitness are not quite the same as in the primitive human struggles. How arbitrary are the convenient distinctions between physical, intellectual and moral qualities and defects is nowise better illustrated than in the elaborate methods which modern complex civilization evolves for the detection, degradation and final extinction of bad stock, whose "degeneracy" is attested not less by physical than by mental and moral stigmata. The struggle for physical fitness never flags, but the physical forms part of a higher and more

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complex test of character determined by a higher standard of social utility. The point is that national government, or state socialism, using the term in its broad sense, as a coercive and educative force, does not, in so far as it is wisely exercised, diminish the individual struggle, repress individual vigor, reduce the arena for its display. It does just the opposite; it sharpens and varies the struggle; by equalizing certain opportunities it keeps a fairer ring, from which chance or other factors alien from personal fitness are excluded; it admits on more equal terms a larger number of competitors and so furnishes a better test of fitness and a more reliable selection of the fittest. Professor Pearson rightly urges that under truly enlightened national government the slow, painful and irregular elimination of bad stock which goes on through progressive degeneracy will be replaced by some rational control of parentage, at least to the extent of preventing through public education, or if necessary by law, the propagation of certain surely recognized unfitnesses.

Does a nation thus firmly planted in rational self-government, with individual competition within its ranks conducted most keenly over a wide variety of fields, furnishing the keenest incentive to the education and display of every kind of personal originality, really require a retention of the crude form of physical struggle with other nations in order to maintain its character and progress? If individuality does not disappear with the removal of the cruder struggle for life within the nation, why should the valid force of nationality disappear if a corresponding change takes place in the nature of international conflict? Does biology furnish any reason for believing that the competition among nations must always remain a crude physical struggle, and that the substitution of "rational" for "natural" selection among individual members of a nation cannot be extended to the selection of nations and of races? It is indeed sometimes suggested that the sole object and result of the stoppage of individual warfare and of the closer coöperation of individuals in a nation is to increase the efficiency of the nation for purposes of physical struggle with

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other nations; and it is stated or implied that the physical conflict of nations or races must ever remain a biological necessity; if the higher races sought to evade the conflict and ceased to equip themselves for it, they would be overwhelmed and crushed by the lower races. In other words, the lower struggle is suspended among individuals in order that it may be waged by nations; on the larger scale it remains a necessity of nature. Now, if we press the analogy of the lower forms of life, there is a plausibility in this argument. In these lower forms the physical struggle is primarily a struggle for food, and it might seem that the tendency of population to press upon the means of subsistence, which is the active force in the conflict throughout the animal world and in the past history of man, must continue as the dominant factor in the future.

If we point out that civilized societies of men can by the fuller development of their reason, wherein they differ from the rest of nature, reduce or eliminate direct pressure on the food supply, first, by their superior control over their material environment, secondly, by a tendency, now plainly visible, to check the growth of population, the biological argument is turned on to another track. If these nations, it is argued, are no longer called upon to struggle for food and check their growth of population while they increase their control over their material supplies, they will become effete for purposes of physical struggle; giving way to an easy and luxurious life, they will be attacked by lower races that multiply freely and maintain their military vigor, and will succumb in the conflict. This is the danger indicated by Mr. C. H. Pearson in his interesting book *National Life and Character*.

The whole argument rests, however, on a series of illusions regarding actual facts and tendencies. It is not true that the sole object and result of the stoppage of individual warfare has been the increase of the efficiency of the nation for the physical struggle with other nations. As man has risen from barbarism towards civilization, the struggle of each people to appropriate the land and food supply of other peoples has

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tended continuously to be replaced by the struggle of each to adapt its own material and social environment to purposes of better livelihood and life. This is the triumph of intensive over extensive cultivation; it implies a growing disposition to put into the arts of industry that energy which formerly went into war, and a growing success in the achievement of this end. It is the need of peaceful, steady, orderly coöperation for this work as the alternative to war, and not the need of war itself, that is the prime cause of the suspension of internecine struggles, at any rate in most societies. This is a matter of pivotal importance in understanding social evolution. If the sole or main purpose of suspending individual conflict was to strengthen the purely military power of a tribe or nation, and the further evolution of society aimed at this sort of social efficiency, it might well be attended by the decay of individual freedom and initiative, by the sacrifice of individuality to a national life. The fact that this result has not occurred, that in modern civilized nations there exists far more individual freedom, energy and initiative than in less advanced societies, attests the truth that military efficiency was not the first and sole object of social organization. In other words, the tendency of growing civilization on the national scale has been more and more to transform the struggle for life from a struggle with other nations into a struggle with environment, and to utilize the fruits of reason in such manner as to divert a larger and larger proportion of energy to struggles for intellectual, moral and æsthetic goods, with the result of a decrease in the struggle for goods which tax the powers of the earth and, conforming to the law of diminishing returns, tend to bring on international conflicts. As nations advance toward civilization it becomes less needful for them to contend with one another for land and food to support their increasing members, since their increased control of the industrial arts enables them to gain what they want by conquering nature instead of conquering their fellow-men.

This truth does not indeed disclose itself readily with its full brilliancy to the eyes of modern civilized peoples, whose

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greed for foreign wealth and foreign lands seems as fruitful a source of wars as in more primitive times. The illusion that it is necessary and advantageous to fight for new territory and distant markets, while leaving most imperfectly developed the home land and home markets, is slow to be dispelled. Its sources have been frequently explored; it has been traced to the dominance of class interests in national politics. Democracy alone will serve to fasten on the national mind the full economy of substituting the inner struggle with natural environment for the outer struggle with other nations. If, as seems possible, the civilized white nations, gradually throwing off the yoke of class governments whose interests make for war and territorial expansion, restrict their increase of population by preventing reproduction from bad stock, while they devote their energies to utilizing their national resources, the motives of international conflict will wane and the sympathetic motives of commerce and friendly intercourse will maintain permanent peace on a basis of international union.

Such a national economy would not only destroy the chief motives of war, but it would profoundly modify the industrial struggle in which governments engage. Democracies chiefly concerned with developing their own markets would not need to spend men and money in fighting for the chance of inferior and less stable foreign markets. Such rivalry as would remain would be the rivalry not of nations but of individual manufacturers and merchants within the nation; the national aspect of industrial warfare, by tariffs and bounties and commercial treaties, would disappear. The dangers and hostilities of national commercial policies are due, as we have seen, almost entirely to the usurpation of the authority and political resources of the nations by certain commercial and financial interests. Depose these interests, and the deep, true, underlying harmonies of interest between peoples, which the prophets of free trade dimly perceived, will manifest themselves; and the necessity of permanent industrial warfare between nations will be recognized as an illusion analogous in nature and origin to the illusion of the biological necessity of war.

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The struggle for life is indeed a permanent factor in social progress; selection of the physically fit is a necessity; but as men become more rational they rationalize the struggle, substituting preventive for destructive methods of selection, and raising the standard of fitness from a mere crude physical robustness to one in which physical endurance is regarded as the raw material of higher psychical activities. Thus, while men no longer fight for food, their personal fitness is maintained; the struggle and the fitnesses are both raised to a higher plane. If this can take place in the struggle of individuals, it can take place in the struggle of nations. The economy of internationalism is the same as that of nationalism. As individuality does not disappear but is raised and quickened by good national government, so nationality does not disappear but is raised and quickened by internationalism.

War and commercial tariffs are the crudest and most wasteful forms of national struggles, testing the lowest forms of national fitness. Let international government put down wars and establish free trade, and the truly vital struggles of national expression will begin. As in the case of individuals so now of nations, the competition will be keener upon the higher levels; nations having ceased to compete with guns and tariffs will compete with feelings and ideas. Whatever there is of true original power and interest in the Celtic, the Teutonic, the various blends of Latin and Slavonic races, can bear its fruit only in times of peace. So far as nationality or race has any distinct character or value for itself and for the world, that value and character are expressed through work. Hitherto the absorption of so much national energy upon military and, in later times, rude industrial occupations has checked the higher forms of national self-expression; while the permanent hostility that has characterized international relations has chilled the higher intercourse and prevented what is really great and characteristic in the national achievements of art, literature and thought from penetrating other nations. For only through the reciprocal interpretation of national ideas, by subtle educative processes, is laid the foundation of true

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feelings of humanity, based, as such feelings perhaps must be, not on vague imaginative sympathy but upon common experience of life and common understanding.

Peaceful intercourse between nations is thus, not merely the condition, but also the powerful stimulus of national energy and achievement in the higher arts of life; for the self-appreciation of national pride can never furnish so wholesome an incentive or so sound a criterion of human excellence as the impartial judgment of civilized humanity, no longer warped by baser patriotic prejudices, but testing what is submitted to it by a universal standard. A few rare individuals of genius in art and literature, a few in science and in religion, have permanently broken the barriers of nationality and have become fertilizing, humanizing forces among peoples not their own,— such men as Jesus, Buddha, Mahomet, Homer, Shakespeare, Plato, Aristotle, Kant, Copernicus, Newton, Darwin. A larger number of great men have exercised some real and abiding influence upon the little world of science and letters, which in the Middle Ages attained an internationalism that disappeared in the rise of military nationalism and is being only slowly rediscovered in our own age. But, outside these conquests of personal genius, the streams of influence and achievement which might have fertilized the wide plains of the intellectual world have been confined within their narrow national channels. Nationalism as a restrictive and exclusive force, fostering political and industrial enmities and keeping down the competition of nationalities and races to the low level of military strife, has everywhere checked the free intercourse requisite for the higher kinds of competition,—the struggle of languages, literatures, scientific theories, religious, political and social institutions and all the arts and crafts which are the highest and most important expressions of national as well as of individual life.

V.

This thought unearths the lowest root-fallacy of the biological sociology,—the assumption that there is but one sort of national efficiency and that it is tested by a contest of military

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or commercial power. The only meaning of "social efficiency," as applied to a nation, is the power which the nation displays of adapting itself to its physical environment and of altering that environment to help the adaptation; the attainments in religion, law, politics, intellectual life and industry are the expressions of this social efficiency. Bearing this in mind, it is evident that for purposes of concrete comparison there are many kinds of social efficiency, and that the notion that civilization is a single beaten track upon which every nation must march, and that social efficiency, or extent of civilization, can be measured by the respective distances the nations have gone, is a mischievous fallacy.

The true social efficiency, or civilization of a nation, shows itself only in its more complex achievements and activities. The biologist who understands his science would recognize that a true test of the efficiency of nations demands that the conflict of nations should take place not by the more primitive forms of fight and the ruder weapons in which nations are less differentiated, but by the higher forms of fight and the more complex intellectual and moral weapons which express the greatest degrees of national differentiation. In a word, we must stop military and commercial warfare between nations, which test very poorly the lowest forms of fitness that are the least characteristic expressions of nationalism, in order that we may substitute the struggle of moral, intellectual and æsthetic ideas and institutions, which best test the higher forms of fitness that are the most characteristic expressions of nationalism. This higher struggle, conducted through reason, is none the less a national struggle for existence because it results in the death of ideas and institutions which are worsted, and not in the death of human organisms. The civilization of the world can proceed upon the higher planes only on condition that this struggle of national ideals and institutions is waged by a free field of competitors; and this struggle cannot be effectively maintained unless the lower military and industrial struggles cease.

Biology always demands as a condition of progress the competition of individuals; but as reason grows in the nation it

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closes the ring and imposes laws, not to stop the struggle, but to make it a fairer test of a fuller form of individual fitness. Biology demands as a condition of world progress that the struggle of nations or races continue; but as the world grows more rational it will in similar fashion rationalize the rules of that ring, imposing a fairer test of forms of national fitness. The notion of the world as a cockpit of nations, in which round after round shall eliminate feebler fighters and leave in the end one nation "the most efficient" to lord it on the dung-hill, has no scientific validity. Invoked to support the claims of militant nationalism, it begins by ignoring the very nature and purposes of national life, assuming that uniformity of character and environment which is the negation of nationalism.

The notion that with the stoppage of war, could it be achieved, national vigor must decay is based on a complete failure to recognize that the lower form of struggle is stopped for the express purpose, and with the necessary result, that the higher struggle shall become possible. With the cessation of war, whatever is really vital and valuable in nationality does not perish; on the contrary, it grows and thrives as it could not do before, when the national spirit out of which it grows was absorbed in baser sorts of struggle. Internationalism is no more opposed to the true purposes of nationalism than socialism within the nation, rightly guided, is hostile to individualism. The problem and its solution are the same. We socialize in order that we may individuate; we cease fighting with bullets in order to fight with ideas. All the essentials of the biological struggle for life are retained, — the incentive to individual vigor, the intensity of the struggle, the elimination of the unfit and the survival of the fittest. The struggle has become more rational in mode and purpose and results, and reason is only a higher form of nature.

The shortsightedness of the school of biological sociologists is nowhere more strikingly displayed than by the exclusive attention they pay to the simpler form of struggle — the direct conflict of individuals and species — to the exclusion of the important part played by "crossing" as a means of progress

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throughout organic life. The law of the fertility of "crosses," as applied to civilization or social efficiency, alike on the physical and on the psychical plane, requires internationalism as a condition of effective operation. It is of course true that throughout history the crossing of national types has been largely achieved by means of war, conquest and subjugation. But this, though subserving progress in the long run, has been a most wasteful, indirect and unsafe method, the selection being determined with no clear view to the future or to any higher purpose of social efficiency. Just in proportion as internationalism promotes free intercourse between nations for higher purposes of peaceful interest, the blending of races by intermarriage will be determined on grounds of affinity more fruitful of improved racial efficiency, and modifications of species more numerous and more novel will compete with one another as factors in the civilization of the world, raising the character and intensity of the competition and enhancing the pace of human progress.

Nay, we may carry the biological analogy still further, following the insistence of Professor Pearson regarding the necessity of bringing direct social pressure, of public opinion or of law, to prevent the fatal process of breeding from "bad stock." If the ordinary processes of physical degeneracy within the nation do not suffice for the elimination of bad stock, but must be supplemented by some direct prohibition of bad parentage, taking the wider scale of operations it might be necessary in the interests of mankind that similar measures should be enforced by the mandates of organized humanity. As lower individuals perish by contact with a civilization to which they cannot properly assimilate themselves, so lower races in some instances disappear by similar contact with higher races whose diseases and physical vices prove too strong for them. A rational stirpiculture in the wider social interests might require a repression of the spread of degenerate or unprogressive races, corresponding to the check which a nation might place upon the propagation from bad individual stock. With the other moral and practical

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issues connected with such a proposal we need not here concern ourselves; confining ourselves to the distinctively biological argument, that course would seem to follow from the application of direct rational rejection of bad stock upon the smaller scale of national life. The importance of this consideration rests upon the fact that this rejection of unsound racial stock implies the existence of an international political organization which has put down war and substituted this rational for the cruder natural selection and rejection of races.

Whether a nation or a society of nations will ever proceed as far as this, or, going further, will ever attempt the fuller art of stirpiculture by encouraging useful crosses of families or races, may be matter of grave doubt; but if the maintenance and improvement of the national stock ever warranted such experiments, we are entitled to insist that logic would justify the application of the same rule in the society of nations.

Again, while it is questionable how far the law of the utility of cross fertilization is transferable from the world of physical organisms to the psychical realm in its literal bearing, the more general applicability cannot be disputed. That scientific theories, religious, social and political arts and institutions gain by free friendly vital intercourse with other theories, arts and institutions, undergoing serviceable accretions, excretions and modifications, is a commonplace of intellectual life. Therefore, whether we regard the contact of ideas and feelings and the arts they animate as a direct struggle for existence in which the worse or falser perish and the better and truer survive, or as a friendly intercourse in which each selects and assimilates something from the others, internationalism is as essential to the efficiency of these processes as nationalism itself.

It is only when we realize the true nature of this spread and fertilization of ideas and arts and institutions — the riper fruits of the spirit of a nation — that we realize the legitimate as distinguished from the illegitimate expansion, the valid significance of empire. When nations compete to take one another's lives or land or trade, the dominion which the conqueror establishes has no element of permanence; another

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shift of the military or commercial tide sweeps away the victory and leaves scarce a ripple mark in the sands. But the influence exerted through arts of peace is more lasting, more penetrating and more glorious. Shakespeare, Byron, Darwin and Stevenson have done incomparably more for the influence of England in the history of the world than all the statesmen and soldiers who have won victories or annexed new provinces. Macaulay has well said: "There is an empire exempt from all natural sources of decay. That empire is the imperishable empire of our art and our morals, our literature and our law." The antagonism between imperialism in the extensive sense and this intensive imperialism is not rhetorical; it is grounded upon biological necessities.

The essential conditions of the lower struggle for the life and land and trade of others preclude the higher and more profitable competition of ideas by which the empire of the national mind is extended; it is not merely the economy of energy which determines that the national vigor cannot at the same time engage effectively in both struggles, but, far more important, the very nature of the lower struggle drives each nationality to feed upon itself in insolent and exclusive pride, inhibiting the receptivity of other nations. Effective international government for national and racial selection can alone be regarded as an accurate and economical instrument of world progress. In the cruder form of the struggle for national selection, accident or numbers or some low form of force or cunning may secure the success of a people whose social efficiency is of a low order, impermanent and unprogressive, and may stamp out or check the growth of a people whose latent powers of achievement and capacity for progress are far superior. Only in proportion as racial or national selection is rationally guided and determined does the world gain security against such wastes and such calamities. An international government is required which can furnish adequate protection to weak but valuable nationalities, and can check the insolent brutality of powerful aggressors, preserving that equality of opportunities for national self-expression which is as essential to the

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commonwealth of nations as to the welfare of the several nations. Only by raising the crude, fragmentary, informal, often insincere beginnings of international government into a stronger, more coherent and more complex authority can the struggle for life proceed upon the highest arena of competition, selecting the finest forms of social efficiency.

VI.

One further objection to the final efficacy of a federation of civilized nations demands consideration. It may be stated as follows: Suppose a federal government of European nations and their colonial offspring to be possible, in such fashion that internal conflicts were precluded, this peace of Christendom would be in constant danger of invasion by the "lower" races, black and yellow, who, assimilating the arms and military tactics now discarded by the "civilized" races, will overwhelm them in barbarian incursions even as the ruder European and Asiatic races overwhelmed the Roman Empire. You cannot get the whole world to the level of civilization which will admit it into the alliance; the powers outside will be a constant menace; and if the main purpose of federation is to eliminate militarism from the economy of national life, effective resistance to the invaders will not be possible. This has been the universal fate of empires in the past; what talisman would this latest federal empire possess enabling it to escape?

To this objection we make only a preliminary answer, since space is lacking for a complete defense. Two factors in the older empires have primarily contributed to weaken their powers of resistance against outside "barbarians" and to strengthen and stimulate the zeal of the invaders. The first is the habit of economic parasitism, by which the ruling state has used its provinces, colonies and dependencies in order to enrich its ruling class and to bribe its lower classes into acquiescence. This bleeding of dependencies, while it enfeebles and atrophies the energy of the imperial people, irritates and eventually rouses to rebellion the more vigorous and less tractable of the

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subject races; each repression of rebellions rankles in the blood, and gradually a force of gathering discontent is roused which turns against the governing power.

The second factor is related to the first, consisting in that form of "parasitism" known as the employment of mercenary forces. This is the most fatal symptom of imperial infatuation, whereby the oppressor at once deprives himself of the habit and the instruments of effective self-protection and hands them over to the most capable and energetic of his enemies. This conjunction of follies and vices has never failed to bring about the downfall of empires in the past. Will it prove fatal to a federation of European states? Obviously it will, if the strength of the combination is used for the same parasitic purposes, and the white races, discarding labor in its more arduous forms, live as a sort of world-aristocracy upon the exploitation of "lower races," while they hand over the policing of the world more and more to members of these same races. These dangers would certainly arise if a federation of European states were simply a variant of the older empires, using a *pax Europaea* for the same purposes and seeking to maintain it by methods substantially the same as those which characterized the so-called *pax Romana.* The problem here presented is a great one, forming in fact the supreme test of modern civilization. Is it possible for a federation of civilized states to maintain the force requisite to keep order in the world without abusing its power by political and economic parasitism?

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THE JUDICIARY OF THE GERMAN EMPIRE. I.

I. Organization.

NO part of European public law contains so little literature in English as that which relates to judicial organization, power and procedure. That this subject has failed to attract English and American students is attributable to two causes. In the first place, the continental judicial systems have not yet received their proper treatment in the constitutions of government, being for the most part merely statutory creations; and, secondly, the investigation of a judicial organization and procedure based upon a foreign legal system has been regarded as a profitless and uninteresting task In view, however, of the increasing attention now given by American students to comparative public law, the time has come when a study of the continental judiciaries may be entered upon with both interest and profit. Of these systems the most recently established, the most modern in principle and the most independent in position is that of the German Empire.

The text of the German Imperial Constitution contains little that has any direct bearing upon judicial organization or procedure. There is no provision for a supreme court or inferior courts; no apportionment of the judicial power between the empire on the one hand and the states on the other, such as one would naturally expect to find in a federal system of government; nor are there any of those guaranties in connection with judicial procedure which the Americans very properly regard as indispensable to a well-secured civil liberty and which they have wisely placed beyond the reach of legislatures and executives. The only court in the empire which has a constitutional basis is the Federal Council, which is designated as a tribunal for the settlement of certain controversies between the states and of constitutional conflicts within the states, in either case

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when called upon by one of the parties interested.[1] The only constitutional apportionment of the judicial power is to be found (1) in the provision which authorizes the states to punish according to their own laws attempts against the existence, integrity or security of the Imperial Constitution or against the public authorities,[2] and (2) in that which designates the Superior Court of Appeals of the three Hanseatic towns at Lübeck as the competent authority for the trial of offenses against the states of the union.[3] The imperial legislature has not yet made use of its constitutional power to enact definite rules concerning the competency and procedure of the court at Lübeck, and consequently the jurisdiction of this court has never been invoked for the trial of such offenses. With these unimportant exceptions everything relating to the organization, jurisdiction and procedure of the German courts is left to the determination of the legislature. The judicial system of the German Empire therefore is wholly a statutory creation, and whatever judicial protection the legislature may provide for individual rights it may withdraw at its pleasure.[4]

The framers of the Imperial Constitution contented themselves with inserting a provision by which the existing competence and procedure of the state courts were recognized until the legislature should create a new system for the whole empire. The foundation of the empire, therefore, wrought no immediate change in the existing judicial establishments. For almost a decade thereafter the *status quo* continued. But already during the time of the North German Confederation a movement had been set on foot for the organization of a uniform system of courts for all the states then composing the union. Toward the end of the year 1869 the Prussian minister

[1] Reichsverfassung, art. lxxvi.

[2] This provision was superseded by the Judiciary Act of 1877, which conferred upon the Imperial Court jurisdiction of the crime of treason against the empire.

[3] Reichsverfassung, arts. lxxiv, lxxv.

[4] The state constitutions, however, are a little more generous in their guaranties of judicial protection. Many of them contain provisions insuring to the accused trial by jury and public oral procedure before a court which is independent of the administrative authorities.

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of justice, upon the request of the chancellor, undertook the preparation of a project for the organization of the courts, and, after various changes, such a project was laid before the Federal Council of the empire in November, 1873, and was shortly thereafter approved by it. A year later it was laid before the Imperial Diet and, after numerous revisions and compromises, was published as law on January 27, 1877, and went into effect October 1, 1879.[1] It is an elaborate law of over two hundred sections, and as the judicial constitution (*Gerichtsverfassungsgesetz*) of the German Empire it ranks as one of the most noteworthy pieces of legislation to be found in the imperial statutes.[2]

But the displacement of the various state judicial systems by one common system for the whole empire by no means exhausted the constitutional power of the imperial legislature on the subject. It still had power to enact legislation with regard to notes and obligations and to create codes of commercial and criminal law and judicial procedure, which, when enacted, would supersede those in existence in the several states.[3] After a considerable struggle a constitutional amendment was carried in 1873, which gave the imperial legislature still further power over the whole civil and criminal law and judicial procedure.[4] With this commission the legislature entered anew upon the task of unifying and nationalizing the private and criminal law and judicial procedure for all the German states. The completion of this task, thirty years after the founding of the empire, is an achievement unparalleled in legal history.

This unification of the law was one of the first and greatest problems of the new empire. The preparation of a code of civil procedure came first in point of time. As far back as 1862 a commission on which a number of the German states were represented had been appointed to draw up a code of civil procedure for the German lands; a similar project was attempted

[1] Laband, Staatsrecht des deutschen Reiches, II, 322.
[2] Reichsgesetzblatt (1877), pp. 41–80.
[3] Reichsverfassung, art. ii, sec. 13.
[4] Reichsgesetzblatt (1873), p. 379.

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in 1864, but nothing conclusive came from either of these efforts. Shortly after the founding of the North German Confederation a commission was appointed to prepare a code upon the basis of the two projects already worked out. The result of their labors was laid before the Federal Council in July, 1870, but further action was postponed for the time on account of the war with France. After the founding of the empire a new commission was constituted, upon which were placed representatives from the South German states as well. The project of this commission was laid before the Federal Council early in 1872, was accepted with a few modifications and in October, 1874, was laid before the Diet. Henceforth its history is the same as that of the Judiciary Act as told above; it was published as law January 30, 1877, and went into effect October 1, 1879.[1]

The codification of the criminal law and procedure was carried on simultaneously with the preparation of the two measures just mentioned. In April, 1868, the legislature of the North German Confederation requested the chancellor to prepare as soon as possible a project for a common criminal law and a code of criminal procedure. The preparation of the law code was completed in a comparatively short time and the code went into effect in May, 1870. It was taken over by the empire and revised in 1871 and again in 1876.[2] Greater difficulties were experienced in the preparation of the code of criminal procedure. It was not until 1873 that the first project was laid before the Federal Council. This project was vigorously attacked in many quarters because it proposed to displace the jury courts by the *Schöffen* courts, and the Diet refused to accept it in that form. It was accordingly recast

[1] Laband, Staatsrecht des deutschen Reiches, II, 319–323; Reichsgesetzblatt (1877), pp. 83–243.

[2] Zorn, Das Reichs-Staatsrecht, II, 368. It is not to be understood that the imperial code displaced all the criminal statutes of the different states. The states still have criminal codes, but they are subsidiary law and relate only to matters that do not fall within the competency of the imperial legislature, such as the press, assemblies, field and forest police, *etc.* In legislating upon these subjects, moreover, the states are under substantial limitations in the matter of fixing penalties. Einführungsgesetz zur Strafprozessordnung, secs. 2–5.

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and in October, 1874, was again laid before the Diet, along with the bill for the organization of the courts and the code of civil procedure, after which its history is the same as that of these two measures as already related. It became law February 1, 1877, and went into effect October 1, 1879.[1]

The existence of a common commercial law obviated the necessity for the preparation of a new code on that subject. Between the years 1848 and 1850 the commercial law and law of bills and notes had been codified and had become the law of Germany by the concurrent action of the separate states. This code was reënacted by the empire in 1871. More recently it has been revised and brought into harmony with the new civil code. It consists of over nine hundred articles and illustrates the possibility of reducing to a coherent whole the mass of legal rules of so advanced a commercial nation as Germany. The work of preparing a national bankruptcy code went hand in hand with the preparation of the criminal codes. A project was laid before the Federal Council in 1873, and referred to a commission of distinguished jurists and representatives of the mercantile and trading classes. They met at Berlin in March, 1874, and framed a code which, without essential modifications, was adopted by the legislature and became law February 10, 1877. Like the other codes it went into effect October 1, 1879.[2]

The great diversity in the private law of the different states, resulting in some cases almost in legal chaos, very early developed a strong sentiment in favor of reducing to a uniform system the whole body of private law. This sentiment had its first triumph in the constitutional amendment of 1873, which extended the power of the imperial legislature so as to cover the whole field of civil and criminal law and judicial procedure. Originally the German states had a tolerable degree of uniformity in their private law as a result of the reception of the Roman civil and canon law during the Middle Ages, but in

[1] Strafprozessordnung, Reichsgesetzblatt (1877), pp. 253–348.

[2] Laband, Staatsrecht des deutschen Reiches, II, 324; Reichsgesetzblatt (1877), pp. 351–389.

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the course of the eighteenth and nineteenth centuries this common basis was well-nigh destroyed by particular statutes.[1] At the time of the founding of the empire there were half a dozen legal systems in the German states besides an infinite number of local statutes and usages. About two-fifths of the population were subject to the Prussian *Landrecht* of 1794; about one-sixth, to the French law as codified by Napoleon in 1804; about one-twentieth, to the Saxon Code of 1863; and the remainder, to the common law.[2] In some states the nobility were subject to a law of their own; in some instances a single inheritance was under the jurisdiction of three legal systems. Shortly after the adoption of the constitutional amendment vesting the imperial legislature with power over the domain of the private law a commission was appointed to prepare a civil code. The commission consisted of nine jurists and two university professors. Thirteen years were spent on the first draft, after which it was published and criticism invited. A flood of criticism was poured forth from all quarters. This was collected and digested and put into the hands of a second commission, charged with revising the first draft. It was not until January, 1896, that the revised draft was laid before the Federal Council. After a sharp parliamentary struggle in the Reichstag, during which a vigorous opposition was made by Catholics, Agrarians, Socialists and Particularists, the code was adopted in July, 1896. January 1, 1900, was fixed as the date upon which it was to go into effect. The new code consists of 2385 articles and is accompanied by an introductory law of 218 articles. It makes a fitting climax to the work of codification in Germany, which has been systematically carried on for thirty years and is paralleled only by the achievements of Justinian and Napoleon in a similar field.

Other imperial laws which go to complete the judicial constitution are the acts for the regulation of the public prosecutors, for regulating the bar, for regulating the costs of the courts, for regulating the fees of court officials and for

[1] Munroe Smith, in POLITICAL SCIENCE QUARTERLY, II, 105; III, 136.

[2] De Grais, Handbuch der Verfassung und Verwaltung, pp. 225–227.

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regulating the fees of witnesses and experts. Most of these went into effect with the Judiciary Act in October, 1879.

The result of all this legislation has been the creation for all the German states of a uniform system of courts, organized upon an imperial plan, and applying a uniform body of private and criminal law according to a uniform system of procedure. Few things have contributed more to the unification of the German nation than this imperial legislation.[1] Especially important was the abolition of the numerous and varied jurisdictions from which the empire suffered during the first decade of its existence. Thus Prussia had maintained a special judicial organization both in the eastern provinces and in the French provinces, to say nothing of the ecclesiastical courts and other special jurisdictions. In some of the states ecclesiastical courts had authority in cases of marriage and divorce, with a distinction between Catholics and Protestants. Here and there patrimonial courts survived, still retaining vestiges of feudal jurisdiction. In some states large classes of individuals were exempt from the jurisdiction of the ordinary courts. As to procedure, moreover, the oral method had been adopted in some states; in others the old practice of written procedure continued. In some the jury court had secured a foothold; in others the *Schöffen* court was still preferred. The position of the advocate and the public prosecutor varied in different states, while court costs and fees were regulated without regard to any rule of uniformity. Some of the states had adopted liberal and enlightened penal codes, while in others nineteenth-century conceptions were conspicuously lacking. The imperial legislation of 1877 swept away the last remnants of feudal and ecclesiastical jurisdiction,[2] abolished the wholesale exemptions which had been conferred by individual states and created uniformity wherever diversity existed. It expressly declared that the contentious jurisdiction should be exercised

[1] Compare a speech of the Emperor from the throne, November 22, 1876. Zorn, Reichs-Staatsrecht, II, 370, note.

[2] As a matter of fact manorial jurisdiction was practically abolished by the administrative reform measures of 1872.

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in all the states through certain specified courts organized according to the prescriptions of imperial law;[1] that all courts should be state courts (as opposed to patrimonial and ecclesiastical courts); that every kind of private jurisdiction should be abolished; and that the exercise of spiritual jurisdiction in temporal affairs should be without legal effect.[2] It provided, furthermore, that exceptional tribunals should not be permitted, save in the case of military courts, and that no accused person should be denied the right of trial before his lawful judge.[3] Finally, it enumerated the classes who were to be exempted from the jurisdiction of the ordinary courts and withheld from the states the power of adding to those exemptions.[4] These were important reforms, the far-reaching effect of which can be fully appreciated only by those familiar with German legal history before 1879.

When it came to a division of the judicial power between the central and the state governments — a problem peculiar to states having the federal system of government — the Germans do not seem to have had any great difficulties. In the first place they made a distinction between the contentious and the voluntary forms of jurisdiction and placed the whole field of contentious jurisdiction under the exclusive control of the imperial government. The exercise of the voluntary jurisdiction, on the other hand, was left to the regulation of the states, and to this subject the prescriptions contained in the imperial law for the organization of the courts and the imperial codes of procedure have, therefore, no application.[5] To relieve the states, however, from the necessity of creating a special

[1] Gerichtsverfassungsgesetz, sec. 12.

[2] *Ibid.*, sec. 15. [3] *Ibid.*, sec. 16.

[4] *Ibid.*, secs. 18, 19, 21; Laband, Staatsrecht, II, 349.

[5] Laband, Staatsrecht des deutschen Reiches, II, 329; Gerichtsverfassungsgesetz, secs. 12, 13; Einführungsgesetz zum Gerichtsverfassungsgesetz, sec. 2. The so-called voluntary jurisdiction is really administrative rather than judicial and is imposed upon the courts partly from historical reasons and partly because of the special fitness of the courts for the performance of such business. It includes such matters as adoption, registration of land titles, authentication of certain legal documents, certain duties which relate to minors, *etc.* See Bornhak, Preussisches Staatsrecht, III, 109; Von Rönne, Staatsrecht, Bd. ii, Abth. ii, p. 13.

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class of tribunals, the law for the organization of the courts provides that the states may, if they choose, confer the exercise of the voluntary jurisdiction upon the regular courts created by the empire for the exercise of the contentious jurisdiction, with this limitation, that no other business of administration shall be imposed upon them.[1] As a result of this, both classes of jurisdiction are generally exercised by the regular courts.

For the exercise of the contentious jurisdiction the imperial law of 1877 created a system of courts of four grades: the district court (*Amtsgericht*), the territorial court[2] (*Landesgericht*), the superior court (*Oberlandesgericht*) and the Imperial Court (*Reichsgericht*).[3] It is provided, moreover, that in any state where several superior courts have been established, except Saxony, within whose territory the Imperial Court has its seat, a supreme court of appeal (*Oberstes Landesgericht*) may be organized and vested with the greater part of the appellate jurisdiction of the Imperial Court in civil cases.[4] Prussia and Bavaria are the only states entitled to the benefit of this privilege at the present time, and Prussia has declined to take advantage of it. Bavaria, therefore, is the only German state which has its own supreme court of appeal and from whose territory the Imperial Court is excluded, so far as concerns appellate jurisdiction in most civil matters. The provision of the law which permits the states thus to oust the jurisdiction of the Imperial Court in civil cases has been the subject of much criticism by the commentators, and it is fortunate for the empire that so few of the states are entitled to make use of the privilege.[5]

It is to be noticed that the law of 1877 for the organization of the courts, while conferring the exercise of the contentious

[1] Einführungsgesetz zum Gerichtsverfassungsgesetz, sec. 4.

[2] Sometimes called "circuit court." [3] Gerichtsverfassungsgesetz, sec. 12.

[4] Einführungsgesetz zum Gerichtsverfassungsgesetz, sec. 8. The exception consists of those cases which may be appealed by means of the *Berufungsprozess*; those which formerly belonged to the jurisdiction of the Imperial Commercial Court; and those which may be assigned to the Imperial Court by special laws.

[5] Laband, Staatsrecht, II, 358.

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jurisdiction upon the four classes of courts of which mention has been made, restricts the contentious jurisdiction to those civil controversies at law (*bürgerliche Rechtsstreitigkeiten*) and criminal cases which do not fall within the competence of either the administrative officials or the administrative courts, or which have not been assigned by imperial law to special courts.[1] Thus the law by implication excludes from the regular courts administrative questions, but it nowhere attempts to define what shall be included under administrative business. This power was left to the individual states.[2]

Finally, it must not be inferred from what has been said of the plenary power of the imperial legislature over the contentious jurisdiction that the administration of justice is completely centralized in Germany. It is not the duty of a *Bundesstaat*, the Germans said, to centralize the whole administration of justice; for, so long as there are individual states, they must have courts and participate in this function.[3] Hence, while the legislature of the empire has enacted certain norms in accordance with which the courts must be organized and their procedure regulated, the actual administration of justice is for the most part left to the states. The courts which exercise the contentious jurisdiction are the creation of imperial law, their competency and procedure are determined by the same authority, they are held by judges whose qualifications and tenure are prescribed by imperial statute and who are charged with the interpretation of imperial law; yet, with the exception of the *Reichsgericht*, they are regarded not as imperial courts but as state courts.[4] The judges are appointed by the state governments; their compensation is determined and paid by the same authorities, under the limitation that the compensation must amount to a substantial support for the judicial

[1] Gerichtsverfassungsgesetz, sec. 13. The controversies at law here referred to are those of private law and not of public law.

[2] Laband, Staatsrecht, II, 340.

[3] Von Mohl, Reichsstaatsrecht, pp. 196–198.

[4] "Die deutschen Gerichte sind Landesgerichte." — Zorn, *op. cit.*, II, 389.

"Die Richter sind Landes- nicht Reichsbeamte." — Schulze, Lehrbuch des deutschen Staatsrecht, II, 136.

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station, not including fees;[1] the courts exercise jurisdiction in the name of the state executives and by authority of state law; their territorial competency is determined by the state governments; they are subject to the oversight of the ministers of justice of the states in which they exercise their functions; and the whole cost of the judiciary, except in the case of the Imperial Court, is borne by the state governments. All of the regular courts, with the same exception, are free from imperial control, under the limitation that whenever justice is delayed or denied in any state it shall be the duty of the Federal Council to interfere and see that the desired relief is afforded.[2]

This is the German theory of centralization in legislation and decentralization in administration. According to that view the law should be national, that is, the national consciousness should prevail over the local consciousness. When it comes to fixing the concepts of the criminal law the German method undoubtedly has elements of great value, and the United States might follow Germany in this respect with profit. Under the limitations and restrictions to which attention has been called, it is the duty of the states to establish courts and exercise the contentious jurisdiction according to the prescriptions of imperial law. The duty of seeing that they carry out this duty in good faith rests upon the emperor, who exercises his authority through the imperial chancellor.[3] If after due notification a state persists in its disregard of the imperial rules concerning judicial administration, the remedy is federal execution. The duty of oversight by the state administration, however, does not include the right to interfere in the course of a trial, which formerly existed in Germany and which to some extent still prevails in France.[4] It consists rather in seeing that courts are provided in sufficient number to meet the necessities of judicial business and of seeing that they are filled with legally qualified judges; that a sufficient number of public

[1] Gerichtsverfassungsgesetz, sec. 7.
[2] Reichsverfassung, art. lxxvii. [3] *Ibid.*, art. xvii.
[4] Schulze, Das preussische Staatsrecht, II, 295.

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prosecutors is provided; and that the rules of procedure prescribed by the imperial legislature are followed.

An examination of the Judiciary Act of 1877 shows that there are four classes of courts in the empire. The first class consists of the regular judicial courts described above. The second includes a series of special tribunals maintained by the imperial government for imperial purposes — such as the military and consular courts, the courts of the imperial protectorates (*Schutzgebiete*), arbitration tribunals and disciplinary courts. In the third class are included a number of special tribunals (*besondere Gerichte*) which are maintained by the states and are exclusively state courts. These are: (1) the Rhine navigation and Elbe customs courts, having their basis in interstate treaties; (2) agrarian courts, which decide questions arising out of the reforms by which tenants were relieved of feudal burdens; (3) communal courts (*Gemeindegerichte*), which have jurisdiction over minor civil controversies in which the amount involved does not exceed sixty marks; and (4) industrial courts (*Gewerbegerichte*), which decide disputes between employers and employees. The establishment or retention of this third class of courts is not obligatory upon the states. They may in fact transfer to the regular territorial courts (*Landesgerichte*) or, with the assent of the Federal Council, to the Imperial Court,[1] the jurisdiction of these tribunals in last instance. Furthermore, the principles of the Judiciary Act and the rules of the imperial codes of procedure have no application in the proceedings of these special tribunals, even when they exercise the contentious jurisdiction, which happens in a few cases. Through the exceptional privileges of these tribunals the states possess the power to erect within their borders a special jurisdiction over which the empire exercises no control.[2]

The fourth class of courts according to my arrangement are the administrative tribunals, state and imperial, and the "competence conflict" courts maintained by the states to settle questions of jurisdiction between the judicial and the administrative courts.

[1] Einführungsgesetz zum Gerichtsverfassungsgesetz, sec. 3.

[2] Laband, Staatsrecht, II, 344.

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Before entering upon a discussion of these different classes of courts it may be well to note that the states are empowered to conclude conventions among themselves for the transfer of the exercise of the judicial power from one to another, or for the exercise of this power in common. A number of conventions of the former class have been made in favor of Prussia. Thus the judicial power of the little principality of Waldeck is exercised to the fullest extent by the Prussian courts; the duchy of Anhalt is under the jurisdiction of the Prussian superior court at Naumburg; the jurisdiction of the principality of Birkenfeld has been vested in the Prussian territorial court at Saarbrücken and the superior court at Cologne; the principality of Schwarzburg has transferred the exercise of its judicial power to the Prussian circuit court at Erfurt and the superior court at Naumburg. Conventions among the states for the maintenance of common courts have been concluded in a number of instances. Thus Prussia and the Thuringian states have established common jury courts at Gera and Meiningen and a superior court at Jena; the three Hanseatic cities, a superior court at Hamburg; the two Mecklenburgs, a superior court at Rostock.

Let us turn now to the organization and jurisdiction of the regular judicial courts as provided in the imperial Judiciary Act of 1877. The lowest of these in the scale, the district or magistrates' court (*Amtsgericht*), is a tribunal of first instance only, and when hearing civil cases it is held by a single judge. It is, then, an exception to the general rule that German courts are organized on the collegial plan. If several judges compose the court, as is often the case, the business is distributed among them and each exercises his functions separately, though one must exercise a general supervision over the others. The organization of the district courts is left to the states, under the limitations prescribed by imperial law with regard to the qualifications, tenure and compensation of the judges. At the present time there are about nineteen hundred such courts in the empire, or about one for every twenty-seven thousand of the population.

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Their jurisdiction in civil matters extends to certain cases in which the amount involved does not exceed 300 marks and to certain controversies without respect to the amount involved, such as disputes between lessors and lessees, employers and employees, travellers and innkeepers or common carriers, declarations of lunacy and prodigality, bankruptcy, *etc.* In criminal cases the judge associates with himself two laymen called *Schöffen*, thus forming a *Schöffen* court, which is a criminal tribunal of the lowest rank. The creation of these courts revived an old Germanic institution which was preferred by many to the jury court. *Schöffen* service is a duty of the subject and carries no compensation except travelling expenses ; the *Schöffen* are selected in the same manner as jurors and are required to possess the same qualifications. Ordinarily these lay judges exercise judicial functions to the same extent as the professional judges and have an equal right to vote on all questions that arise during the progress of the trial. They do not, however, take part in fixing the punishment. The criminal jurisdiction of the *Schöffen* court extends to all misdemeanors and petty crimes for which the punishment does not exceed three months' imprisonment or a fine of 600 marks. There are a few minor criminal cases in which the lay assessors do not participate, and which are settled by the judges alone or by the police authorities. Jurisdiction of certain offenses may also be assigned to the *Schöffen* court by the criminal chambers of the territorial court upon the proposition of the public prosecutor.[1]

Next above the district courts are the territorial courts (*Landesgerichte*).[2] Their organization is collegial; they are divided into civil and criminal chambers, usually consisting of three and five judges respectively, and they are courts of both first and second instance. The territorial competency of each court and the number of judges who shall constitute it are determined by the state governments, subject to the

[1] Gerichtsverfassungsgesetz, secs. 22–57; Holtzendorff, Rechtslexikon, arts. "Amtsgericht" and "Schöffengericht."

[2] There are at present 172 territorial courts in the empire, or one for every 303,953 of the population. — Statesman's Yearbook (1898), p. 540.

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limitation that the minimum number of judges who shall constitute a chamber in certain cases is fixed by imperial law. At the head of the court is a president, who is at the same time president of one of the chambers and who presides over the court when it sits *in plenum*, which rarely occurs except to prevent conflicting decisions among the chambers. Before the beginning of each business year the *präsidium*[1] divides the court into chambers, the president announces the chamber to which he will attach himself, the presidents of the other chambers are chosen, and the business for the ensuing year is distributed among the several chambers. The division into civil and criminal chambers is made obligatory by imperial law, and every judge may be a member of several chambers.

The civil chambers have appellate jurisdiction in cases which come up from the district courts, and original jurisdiction in controversies which have not been assigned to the district courts. In the latter class of cases, however, the parties may by express agreement bring their suits in the district courts if they choose. The jurisdiction of the criminal chambers extends to certain preliminary investigations as provided in the code of criminal procedure; to appeals from decisions of special inquest judges, of the district judges and of the *Schöffen* courts; to misdemeanors (*Vergehen*) which are not cognizable by the *Schöffen* courts; to those crimes (*Verbrechen*) the punishment for which does not exceed five years' imprisonment in the penitentiary; to crimes committed by persons under eighteen years of age; and to certain other cases enumerated in the criminal code.

For localities remote from the seat of a territorial court provision is made for a sort of detached criminal chamber which meets at the seat of the district court. Such a special chamber is established by the minister of justice and is held by judges of the territorial court, or by district judges designated by the minister of justice and the *präsidium* of the territorial court. The Judiciary Act does not provide for detached

[1] The *präsidium* of a court consists of the president, the directors and the senior member in judicial service.

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chambers for civil cases in general. But where commercial interests are sufficiently large to justify it, the minister of justice is authorized to establish a separate chamber for the exclusive determination of commercial cases, such as suits between merchants, suits on bills of exchange, suits concerning trademarks, *etc.* This chamber may hold its sessions at the seat of the territorial court or at any other place in the district. It consists of one judge learned in the law and two active representatives of the mercantile class. The position of the lay members is honorary, and they are appointed upon the recommendation of certain commercial organizations within the district. They take an oath of office, and during their term they have all the rights and duties of judicial officers.

For the trial of crimes not cognizable by the criminal chambers or the Imperial Court, jury courts are provided, to meet periodically at the places at which the territorial courts are held, though for special reasons sessions may be held elsewhere in the district. They are treated as a part of the territorial court, though really their organic connection with it is not very close. The jury court consists of a bench of three judges and twelve jurors. The jurors determine the question of fact, and the judges apply the law. Jury service is a duty of the subject, but the qualifications are more rigid than in the United States, and the disqualifications are more numerous. Jurors are drawn by lot in open session of the territorial court and in the presence of at least two judges and the public prosecutor, from a list of eligibles prepared by the *Vorsteher* of the commune before the beginning of each year. The judicial members of the jury court are appointed by the president of the territorial court from among the territorial judges, except in the case of the president, who is appointed by the president of the superior court.[1]

Next above the territorial court, in the judicial system, is the superior court (*Oberlandesgericht*). Like the territorial courts, the superior courts are collegial in form and are divided

[1] Gerichtsverfassungsgesetz, secs. 58–119; Holtzendorff, arts. "Schwurgericht" and "Landesgericht"; Laband, *op. cit.*, II, 338 *et seq.*

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into civil and criminal senates, with a president of the court and the necessary number of senate presidents.[1] The rules for the distribution of business among the senates and for the assignment of members are the same as for the chambers of the territorial courts. The superior courts have no original jurisdiction but are exclusively courts of appeal from the territorial courts. At the present time there are twenty-eight superior courts in the empire, fifteen of which are in Prussia. The superior court at Berlin is known as the *Kammergericht*, and is the special forum for the members of the Hohenzollern families.

Coming next in the series is the Supreme Court of Appeal (*Oberstes Landesgericht*), which, as has already been stated, may be established in any state where there are several superior courts in existence except Saxony. As yet, Bavaria alone has elected to establish such a tribunal. It consists of fifteen judges, has its seat at Munich, and is a final court of appeal in most civil cases decided by the Bavarian territorial courts.

Finally, standing at the top of the judicial hierarchy is the Imperial Court, the only judicial tribunal in Germany whose jurisdiction is coextensive with the territory of the empire, and the only one which, considered from every point of view, is an exclusively imperial judicial organ. It may be said that the idea of a supreme court of appeal for all the German states was not a new one to the framers of the Judiciary Act of 1877. During the later Middle Ages and until the end of the seventeenth century the *Reichshofgericht* and the *Reichskammergericht* were important tribunals of ultimate appeal for many of the German states.[2] The former was primarily a personal court of the emperor and exercised criminal jurisdiction over the immediate subjects of the emperor (*Reichsunmittelbaren*), even when ruling princes. Where a crime might involve the deposition of a prince the court conducted the preliminary

[1] The divisions of the *Landesgerichte* are called chambers; those of the higher courts, senates.

[2] Schulze, Lehrbuch des deutschen Staatsrechts, II, 129–131.

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investigation, leaving the final decision to the Diet. The *Reichskammergericht* was a far more important court. It had original jurisdiction in civil suits against *Reichsunmittelbaren* and appellate jurisdiction in civil cases from decisions of state courts. It was also an administrative court of highest instance. But the value of the court was to a considerable extent impaired by the *privilegium de non appellando*, which was bestowed upon many of the great princes, and which insured that no appeal should be taken to the Imperial Court in their dominions. With the break-up of the empire in 1806 the whole administration of justice fell into the hands of the individual states.[1] The greater states established superior courts of appeal of their own; the smaller states dispensed with them entirely. When the Germanic Confederation was formed in 1815 no attempt was made to revive the old imperial courts or to establish a similar organ; but as the right of three instances was regarded as an inalienable right of the subject, provision was made for joint superior courts in the smaller states which had neglected to establish courts of appeal.[2] In 1849 a Prussian project for a Supreme Imperial Court having some elements in common with the Supreme Court of the United States was brought forward, but the hopes of the Liberals were shattered in this respect as in others.[3] By the time of the formation of the North German Confederation the sentiment in favor of a final court of appeal for the German states was very strong, and many projects were presented, for all of which the old *Reichskammergericht* served as a convenient model. The articles of union, however, were adopted without any provision for a supreme court. But in June, 1869, the Diet took a step the constitutionality of which has been questioned.[4] It established a Supreme Court of Commerce (*Reichsoberhandelsgericht*)

[1] "The Germans," says Schulze, "looked with a certain pride upon their imperial courts, especially the *Kammergericht*, and frequently referred to it as the palladium of the German imperial constitution. It was therefore earnestly deplored when this honorable institution came to an end." — Lehrbuch des deutschen Staatsrechts, II, 131.

[2] *Bundesverfassung*, art. xii.

[3] Schulze, Lehrbuch, II, 133.

[4] Laband, Staatsrecht, II, 317.

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for the Confederation and conferred upon it a considerable jurisdiction, which was enlarged by statute from time to time.[1] This tribunal was taken over by the empire in 1871, and continued to exist until 1879, when it was succeeded by the present Imperial Court, with its seat at Leipsic[2] in Saxony.

At the present time the court is composed of four criminal senates and six civil senates, with an aggregate membership of over ninety judges, including the president of the court and the senate presidents.[3] The judges are appointed by the emperor upon the nomination of the Federal Council, which is under no obligation to apportion the nominations with reference to the states or to any geographical basis whatever. The tenure of the judges is for life, and the qualifications are the attainment of the thirty-fifth year and eligibility to judicial office in one of the states.[4] The separation into senates, the distribution of business among the senates and other matters of routine are determined in a manner substantially the same as in case of the territorial and superior courts. In the choice of presidents the four members oldest in judicial service are entitled to preference. The main differences between the Imperial Court and all other judicial courts created by imperial law are: first, the Imperial Court exercises the jurisdiction of the empire, *i.e.*, its jurisdiction is *reichsstaatlich*, not *landesstaatlich;* second, the members are imperial officers, are required to take an oath of allegiance to the empire, are paid out of the imperial treasury and are responsible only to the imperial government for their conduct.

The chief purpose of the Imperial Court is to preserve legal unity within the empire, and consequently its jurisdiction is coextensive with the territory of the states composing the union. It is a court of first, second and third instance. In

[1] Von Mohl, Reichsstaatsrecht, p. 196; Schulze, Lehrbuch des deutschen Staatsrechts, II, 133 *et seq.*

[2] This place was chosen only after a spirited parliamentary struggle in which the Prussian members, who favored Berlin, were beaten by a majority of two votes.

[3] Almanach de Gotha for 1902, p. 488.

[4] While the emperor is restricted to those nominated by the Federal Council, he may reject the nominations and demand others.

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civil matters it has no original jurisdiction, and its appellate jurisdiction extends to appeals from decisions of the superior courts, except in Bavaria, consular courts and the Imperial Patent Office Administrative Court. Upon request of any state concerned, and with the assent of the Federal Council, the Imperial Court may also settle conflicts of jurisdiction arising between the judicial and administrative courts of such state. This authority has rarely been made use of, since the states generally have provided "competence-conflict" courts of their own. The criminal jurisdiction of the Imperial Court extends in first and last instance to all cases of high treason against the emperor or against the empire;[1] to appeals in certain cases from the decisions of the territorial courts and the jury courts; and to appeals from decisions of the consular courts. The chambers discharge their functions separately and act *in plenum* only to prevent conflicting decisions. There is nothing to prevent the court as a whole from overruling a previous decision; but, as its primary purpose is the maintenance of legal unity, the commentators insist that the former decision ought not to be disturbed unless the legal basis for it can be shown to be unsound.[2] Finally, the Imperial Court is not simply a cassation tribunal with power merely to affirm or quash the decisions of the lower courts and order new trials, as is the case with the French Supreme Court, but it is also a court of reformatory jurisdiction in some cases — a *Revisionsgericht* — with power to revise decisions brought up for its consideration and substitute for them decisions of its own.[3]

Before concluding the discussion of the organization of the regular judicial courts it may be well to refer briefly to the state attorneyship, which was first provided for in all the German states in 1879. The Judiciary Act requires that there

[1] Gerichtsverfassungsgesetz, sec. 136. The effect of this provision in the Judiciary Act was to supersede art. lxxiv of the Imperial Constitution. By that article the punishment of treason against the empire was left to the action of the states according to the laws therein existing. Art. lxxv, which relates to the trial of the crime of treason against the states, has also been rendered practically nugatory.

[2] Zorn, Staatsrecht, II, 416; Holtzendorff, Rechtslexikon, III, 392.

[3] Schulze, Lehrbuch des deutschen Staatsrechts, II, 140.

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shall be attached to every regular judicial court a public prosecutor, who shall have sole charge of the prosecution of cases. In the case of the Imperial Court there is a superior attorney-general and one or more subordinate attorneys-general, who are under the supervision of the imperial chancellor and who are appointed by the emperor upon the nomination of the Federal Council. Each superior court, territorial court and jury court has attached to it one or more state attorneys, and each district court one or more district attorneys, appointed by the state governments. The organization of the state attorneyship is usually collegial in form, but the law requires that it shall always act as a single organ (*einheitlich Behörde*). These prosecutors are distinctly state officers and are under the supervision of the minister of justice of the state in which they exercise their functions. They are independent of the courts and of popular control, but not of the administration. Since 1882 there has been an imperial bureau of justice, consisting of a secretary of state, a director and a number of councilors. Its duties are concerned primarily with the preparation of measures which relate to the Imperial Court, the bar and the imperial codes. It also exercises supervision over the execution of the imperial justice laws, and until recently it supervised the preparation of the civil code.

Such is the organization and such the jurisdiction of the regular judicial courts created by the act of 1877. As for the special tribunals set up both by the imperial government and by the states, embracing the second and third classes in the arrangement above,[1] the reference which has already been made in another connection must suffice for this paper. It remains, therefore, to notice briefly that part of the judicial system which has to do with the settlement of administrative controversies.

The idea of a special class of tribunals for the settlement of administrative questions was borrowed from the French, who near the close of the eighteenth century attempted to free the administration from judicial control by forbidding the judges to interfere in any manner with the administrative authorities

[1] *Ante*, p. 501.

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and by providing a system of quasi-judicial tribunals, upon which the administration was largely represented, to exercise jurisdiction over the acts of administrative officials. The idea was strong that the function of deciding controversies in which the government was primarily interested, and in which great weight ought to be given to considerations of expediency, should be vested in a tribunal composed of men trained in public law and administration rather than in a court composed of men trained only in the private law, and whose lives had been spent in the application of the principles of the private law. By such tribunals the French and Germans have sought to avoid some of the awkward situations into which American judges have worked themselves through a too rigid adherence to the principles of the private law in the settlement of public administrative questions.[1] The end is attained by restricting the judicial courts to the settlement of controversies of private law and criminal cases and by intrusting the development of all other public law to courts composed partly of trained jurists and partly of active administrators. This arrangement has unquestionably contributed dignity and efficiency to the administration, but it is not so clear that it has not been at the expense of private rights.

The so-called separation of justice from administration was first effected in Prussia in 1808.[2] At the time of the establishment of the empire in 1871 a number of the German states had administrative courts, and no attempt was made to interfere with them or to supersede them by a uniform system, as was done later in the case of the judicial courts. On account of the great diversity of administrative conditions in the different states it was regarded as inexpedient to attempt to establish a uniform system of administrative courts with jurisdiction of certain enumerated questions; that is, it was deemed improper to attempt to fix the boundaries

[1] For example, the doctrine of the United States Supreme Court in the case of New Jersey *vs.* Wilson, 7 Cranch, 164, and in Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.

[2] De Grais, Handbuch der Verfassung und Verwaltung, p. 220.

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between justice and administration by imperial law.[1] Therefore the whole matter of administrative courts and their jurisdiction was left to the states without limitation or restriction. The constitutional significance of this lies in the fact that the states possess the power so to fashion their administrative jurisdiction as to withdraw a large class of controversies from the jurisdiction of the regular courts, and consequently from the operation of the imperial justice laws and rules of procedure. In other words, it belongs to the states to restrict or extend the sphere of operation of the imperial codes according as they choose to enlarge or narrow the sphere of administrative jurisdiction.[2] This power is implied in the wording of Section 13 of the Judiciary Act.

The organization of the administrative courts varies in the different states. In Prussia, where the administration has been most scientifically organized, three instances have been provided, represented by the circle committee, the district court and the supreme administrative court, all created in 1875. The last is a court of great influence and popularity. Its creation was largely the work of Professor Rudolph Gneist of the University of Berlin, who became one of its first members. The judges are appointed for life by the king; one-half of them must be qualified for judicial office, the other half for the higher administrative service. The seat of the court is at Berlin.[3] At the present time administrative courts exist in Prussia, Bavaria, Würtemburg, Baden, Hesse, Anhalt, Brunswick, Saxe-Meiningen and Lippe.[4] The judges generally enjoy a life tenure (as distinct from the French system, where they hold at the pleasure of the administration), and they are not subject to the direction of the higher administrative authorities. They have the same right as other judges to inquire into the validity of laws and ordinances and to refuse to be bound by such as have not been properly enacted.[5]

[1] Schulze, Lehrbuch des deutschen Staatsrechts, II, 136.
[2] Laband, Staatsrecht des deutschen Reiches, II, 342.
[3] De Grais, Handbuch der Verfassung und Verwaltung, p. 56.
[4] Meyer, Deutsches Staatsrecht (edition of 1899), p. 605.
[5] *Ibid.*, p. 470.

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To settle conflicts of jurisdiction which must inevitably arise between the judicial courts and the administrative courts or administrative authorities various methods had been resorted to, when in 1847 Prussia adopted the system of special "competence-conflict" courts, composed partly of judges learned in the law and partly of administrators appointed by the king.[1] The Prussian constitution of 1850 made mandatory the settlement of conflicts of authority between the courts and the administrative authorities by a special tribunal of this kind.[2] The Judiciary Act of 1877 recognized the validity of the "competence-conflict" courts wherever they existed, and attempted to secure uniformity in their organization by providing that at least one-half of their membership should consist of judges of the Imperial Court or of the superior courts, that all members should be appointed for life, and that the decisions of the courts should be rendered in public session of at least five members after a hearing of the parties concerned.[3] These are the restrictions placed upon any state which chooses to provide for the settlement of questions of jurisdiction by means of a "competence-conflict" court. If any state chooses not to establish such an organ, the Judiciary Act provides that it may send its cases to the Imperial Court for decision. So far Bremen is the only state that has made use of this privilege.

Finally, it must be noted that a number of administrative courts have been established for the imperial service. The most important of these are the poor law board, the railway court, the patent office court, the disciplinary court and the marine office court. There are, however, no imperial "competence-conflict" tribunals. Conflicts of authority between the administrative authorities in the imperial service and the courts are settled, as in England and the United States, by the regular judicial courts.

[1] Von Rönne, Staatsrecht der Preussischen Monarchie, Bd. i, Abth. i, p. 301.

[2] Art. xcvi. The court established in accordance with this article sits at Berlin and consists of eleven members, six of whom are judges of the superior court.

[3] Einführungsgesetz, sec. 17.

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In reviewing the organization of the German judiciary the features which appear most striking to an American student are its statutory position and the absence of every constitutional guaranty of judicial protection; the constitutional importance which is attached to the separation of the contentious from the voluntary jurisdiction; the existence of one uniform system of courts for the interpretation of imperial law and state law alike, instead of a dual system with the ever-recurring question of concurrent and exclusive jurisdiction; the existence of a uniform judicial procedure for all the regular courts of the empire; the collegial character of all the courts except those of lowest instance and their division into civil and criminal chambers; the provision for auxiliary judges (*Hülfsrichter*) for all the courts except the Imperial Court; the participation of the lay element in the trial of criminal cases; the restriction of the regular judicial courts to the decision of controversies of private law and criminal cases; the existence of special judicial courts not subject to the imperial justice laws and codes of procedure; the creation of administrative courts for the decision of administrative questions and the absolute power of the states to fix the content of the administrative jurisdiction; the separate codification of the commercial law and the provision for special commercial chambers in those parts of the country where the commercial interests are large; the designation of a state court as the competent authority for the trial of attempts against the security of any one of the states; the power of the imperial authorities to coerce a delinquent state which denies justice to an individual or which is tardy in giving him the proper judicial relief; the regulation by imperial law of the duties and relations of the bar, the public prosecutors, and the regulation of court costs and fees of court officials; and, finally, the creation of one common court for all the empire, whose duty is to preserve legal unity by its decisions.

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REVIEWS.

Western Civilization. By BENJAMIN KIDD. New York, The Macmillan Company, 1902. — 12mo, vi, 538 pp.

There seem to be two rules which writers on political science must adopt if they desire at this time to be widely read. The first rule is, that they must talk a great deal about evolution; the second is, that they must never mention the name of God.

Now these two rules put our authors to considerable inconvenience. If they believe this world came into existence by accident, they can very well dispense with reference to the Creator; but if they are impressed with the evidence of design in the world and see in its development traces of foresight or Providence, as Mr. Kidd does, it is awkward, in obedience to the second of these two rules, to have to substitute for the short and familiar word "God" the elaborate, inelegant — and if I may venture to say so — altogether superfluous expression "Projected Efficiency." And if they must talk about evolution, they are likely to be reminded that evolution is a biological theory, which in its general terms requires some knowledge of biology, and in its details requires a great deal of such knowledge.

Anything written by an author so widely read in the United States as Mr. Kidd is entitled to careful consideration, but we must not allow the authority he has acquired, to check analysis or silence criticism; on the contrary, the very authority he has makes it all the more important that we should scrutinize the premises from which he derives conclusions likely to gain general acceptance. Let us begin, then, by stating concisely Mr. Kidd's argument.

Evolution, according to Mr. Kidd, has been heretofore regarded as a process having its "centre of significance in the present" (p. 45). This was Darwin's view of it. A new conception of it which Mr. Kidd has invented upon a reading of Weismann's works, but which in a note Mr. Kidd explains Weismann did not himself "clearly" perceive (p. 55), is that evolution involves a struggle in which efficiency *in the future* is the determining quality. And this new principle Mr. Kidd christens "Projected Efficiency." According to this theory, evolution is not a mere survival of the fittest in any one period of time — "for the time being," as Mr. Kidd puts it

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(p. 42); it is a survival of the fittest, operating not simply for the benefit of the individual in a mere struggle for existence in the present, but for "a larger advantage probably always far in the future to which the individual and the present alike are subordinate." So that, according to Mr. Kidd, when two bucks are fighting for a doe it is not the stronger of the two bucks who will win the fight and the doe, but the one whose victory will result in a "larger advantage probably always far in the future"; and so, too, in the fight for pasture, the hunt for game, and all the varying conditions of the struggle of life, it is not fitness in the present that determines survival, but fitness — shall it be written down? — in the future!

To apply to a concrete instance the new doctrine of evolution which Mr. Kidd propounds with undoubted dignity and eloquence, is perhaps a severe test. There may be, notwithstanding the grotesque juxtaposition of theory and fact, an element of profound importance and utility in Mr. Kidd's theory of projected efficiency. But in so far as Mr. Kidd attaches it to evolution, and endeavors to support it by evolution, it is well to point out at once that Mr. Kidd is wrong, and that evolution, concerning which everybody now writes with as complacent assurance as that with which astrologers once wrote about the stars, is a very definite scientific conclusion drawn from a vast collection of facts, some knowledge of which is essential to one who undertakes to generalize about them.

How imperfect Mr. Kidd's knowledge of evolution is, becomes clear from his own account of it. "The fundamental conceptions of the Darwinian theory," he tells us (p. 34), "are only two in number"; and he defines these two as "fertility" and "variability," that is to say, fertility so great that all offspring cannot survive, and variability that permits of "favoured races" surviving (see p. 36). Now there is in the omission of one of the three essential elements of the evolutionary process, namely, "environment," and in the undiscriminating use of the word "favoured," an explanation of all the errors into which Mr. Kidd falls with regard to this technical question. He belongs to the lamentably large class of political philosophers who use the word "evolution" as identical with "development." Ignoring the determining rôle which environment plays in the struggle for life, he regards evolution as the process through which the development of living organisms has taken place in the past, and because the process in so far as his observation extends has been a process of development in the past, he confidently looks forward to a continuing process of development in the future.

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There is, of course, no excuse for this flagrant error. It has been pointed out again and again that the so-called survival of the fittest is, as it were, a two-edged sword that smites the less developed organisms in one environment, allowing thereby the survival of the more developed, whereas in another environment it ruthlessly destroys the higher organisms, allowing only the survival of the lower; that it includes degeneration as well as development; that the word "fittest" is not complete till there is added to it the word "environment," — so that if the environment be that of New York, it will favor the survival of a Pierpont Morgan, whereas if it be the desert or the pole, it will favor that of the lizard or the Esquimaux.

The importance of the environment is dwelt upon here, not only because no theory of evolution that fails to take account of it can be complete, but because it is this very failure to appreciate the rôle of environment that betrays Mr. Kidd (see footnote, p. 32) into a contemptuous dismissal of the "distinction made by Huxley, between the cosmic process and the ethical process" as "entirely superficial," and into the extraordinary statement that Huxley had himself abandoned it. It may be that the words in which Huxley described the difference between nature and art or between natural selection and human selection could be advantageously changed; but the fact of the difference — a difference which Mr. Kidd throughout ignores in his use of the terms "natural selection" and "human selection" — is one of transcendent importance, furnishing as it does the key to the momentous problem; for on it depends no less a question than whether man is, like a sponge, the unconscious and irresponsible product of a natural process, or, like a God, the conscious and responsible master of it. The failure of Mr. Kidd to appreciate this difference is the more remarkable, since it is upon this difference that the value of his own conclusions depend: for if Herbert Spencer be right and Huxley wrong, then there is no rational ground for hope that man can accomplish much or anything in working out his own salvation; whereas, if Herbert Spencer be wrong and Huxley right, it is upon man's wisdom and morality that the whole future depends. In other words, *natural* selection knows nothing of the future — it knows nothing but the present, knows neither justice nor mercy, moves indifferently towards improvement or degeneration; whereas *human* selection on the contrary can, if enlightened, work for the future, assure improvement, prevent degeneration, and through mercy attain justice.

The path of evolution is like that of a mountain climber who, in overcoming obstacles, has sometimes to move down instead of up,

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and sometimes to turn his back on the very summit which he desires to reach. A student of evolution who examines the details of its path may often be misled by its direction; it is indispensable to study the whole path if we are to draw correct conclusions as to its ultimate aim. But in attempting to point out the way of evolution to us, those who confine attention to its ultimate direction may blunder as much as those who, regardless of its ultimate direction, confine themselves to particular parts of it. For example, there are features in evolution, such as the sacrifice of the weak, the tyranny of the environment, the survival of the pitiless, which, if studied apart, are of a nature to justify despair; whereas if we turn to the blessings of civilization, to the compassion we find there for the weak, to man's ability to improve his environment, to the possible survival of the wise and just, we seem to find in this same evolution grounds for a transcendent optimism. Unfortunately, those who, like Mr. Kidd, have the gift of generalization, are not often willing to investigate detail, and those who are willing to investigate detail seldom unite with it the gift of generalization; and so the general reader loses his way, misled alike by both, until by repeated and often costly experiment he learns for himself the danger of neglecting details on the one hand or of attaching too much importance to them on the other.

Mr. Kidd has rendered us a service in directing attention to features in the process of development to which previous writers have not given due importance; undoubtedly there has been throughout the process a perpetual adaptation to future conditions which Mr. Kidd calls the "principle of projected efficiency," and which the unsophisticated pious have been heretofore contented to describe as God. Whether this principle has been as much neglected in the past as Mr. Kidd claims, it is probably unnecessary to discuss; it may be that the principle has been recognized under its more familiar name, and that Mr. Kidd's title for it deserves the chapters which he devotes to its justification; but the question whether the principle of projected efficiency is to be adopted by the language of evolution is relatively unimportant, as compared with the practical problems of evolution which daily confront us. Many will doubtless be lifted by the thought that evolution is working in silent obedience to the principle of projected efficiency; but some will mournfully inquire how this principle is going to help man to face the tragic riddle of every-day life, for the failure to answer which men and women are hourly and multitudinously sacrificed by the remorseless Inquirer.

EDMOND KELLY.

PARIS, FRANCE.

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Studies in History and Jurisprudence. By JAMES BRYCE, D.C.L. New York, Oxford University Press, American Branch, 1901. — xxiii, 926 pp.

A historian and university professor of civil law, who becomes a parliamentary leader and a member of the ministry of a great empire, may be expected to regard the law at an angle different from that of the average student and teacher. He will naturally be more attracted to public law than to private law; he will feel more interest in the way in which private law is made than in the finished product; and in his examination of institutions or theories he will never lose sight of their social utility. The essays collected in this book are in part the result of Mr. Bryce's activity as Regius Professor of Civil Law at Oxford for nearly a quarter of a century; but only one of them, that which treats of marriage and divorce (Essay XVI), deals with topics ordinarily discussed in a course of institutes, and even in this essay it is the question of the legislative attitude which directs and controls the investigation. It is again from the point of view of the legislator that Mr. Bryce studies the development of Roman and of English law, in Essays XIV and XV, and the extension of these systems throughout the world in Essay II. A larger number of studies deal with public law. The Roman Empire is suggestively compared and contrasted with the British Empire in India (Essay I); the constitutions of primitive Iceland, of the late Dutch republics in South Africa and of the new Australian federation are described and criticised (Essays V, VII, VIII); and, in two of the most original studies in the volume, constitutions are compared as regards their flexibility or rigidity and as regards the action upon them of centripetal and centrifugal forces (Essays III, IV). A third group of studies deals with theories fundamental to politics and to law; but even these matters are treated practically. In discussing obedience (Essay IV), the author is not concerned with the question why men should obey, but with the questions why they do obey and whether they are likely to go on obeying. The following essays on sovereignty, natural law and the relation of law and religion (Essays X, XI, XIII) are historical studies of concepts actually held, and of their effect upon men's minds. In describing and comparing the different methods of legal science (Essay XII), the author is chiefly interested in their practical value in shaping legislation and in facilitating the application of law. Essay VI, on the views of the Constitution of the United States presented by Hamilton and by de Tocqueville, is largely a demonstration of the uncertainty of political forecasts. The

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inaugural and valedictory lectures which Mr. Bryce delivered at Oxford on assuming and on abandoning his professorship indicate the same mental bent. Each emphasizes the practical value to the English barrister of some knowledge of Roman law. The principal difference is that in 1871 the lecturer laid more stress on the direct advantages of such knowledge to the practitioner, and in 1893 on the educational value of Roman jurisprudence in cultivating clear legal thinking. In Essay XII Mr. Bryce distinguishes four methods of studying and presenting law. One of these methods he discusses respectfully but never employs — the metaphysical.

Mr. Bryce's close touch with affairs, and with great affairs, and the breadth of his reading, his experience and his sympathies, show themselves to advantage on almost every page of this volume. There are few of these essays which give the impression of striking originality; there is none which the reader at once feels to be subtle or profound, although many of them go deeper than they seem to go. A British statesman who is either subtle or profound learns to disguise those qualities in his public utterances, and these studies are intended and adapted to reach a fairly wide circle of readers. All of the essays, however, are characterized by that quality which is called common sense, but which, if common at all, is common only as a latent and inarticulate instinct which is capable of responding to that most uncommon thing, a happy formulation. In other words, they are characterized by practical wisdom.

Of this book more than one edition should be required, and in future American editions it is to be hoped that the present unwieldy single volume will be divided. It is also to be hoped that a few statements of minor importance, some of which are scarcely correct while others are misleading, will be reconsidered. For example, on page 55 it is said that before the end of the Roman Republic there were many freedmen in the Senate. The references collected by Mommsen (*Staatsrecht*, I, 459) indicate the presence only of sons of freedmen. On page 163 we are told that the powers of the Roman magistrates were not limited by statute. It is of course true that the magistrates were limited by the possible intercession of colleagues or of tribunes far more than by statute, but the statement as it stands is too strong. "Purely political cases" in American federal jurisprudence are not easily defined in few words, but the definition given on page 196 would have excluded the jurisdiction of the United States Supreme Court in many cases in which it has been exercised, *e.g.*, in the legal-tender cases. On page 330 Livingston is

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described as "author of the Louisiana code"; but *the* Louisiana code suggests the civil code, of which Livingston can hardly be termed, with propriety, the author. On pages 539, 540 it is urged that the amending power in the United States cannot be regarded as sovereign, because this power so rarely acts. Here Mr. Bryce seems to confuse what he elsewhere carefully distinguishes, — legal and practical sovereignty. That "some" of the earliest Roman jurists were priests, as is said on page 676, is a needlessly cautious statement; and the chief pontiff, Tiberius Coruncanius, is remembered, not because he was ready to give advice to everybody (*ibid.*), but because he gave legal instruction to laymen. Finally, to say that the law of the Roman Empire held its ground in northern France in the form of customs is to give a false impression of the character of these customs, which was essentially Teutonic.

The question of the genesis of the Roman *ius gentium* brings us on more debatable ground; but the reviewer is not able to share the author's conviction that the development of this body of law antedates the establishment of the peregrine prætorship (pp. 570–575, 753). What little evidence we have indicates that prior to the middle of the third century B.C. the peregrine who obtained legal protection at Rome, whether through a *hospes* or a patron or by virtue of treaty, was protected according to the rules of the Roman civil law. There is no evidence that *ius gentium* was ever applied, even at a later period, to any peregrines except those who were subjects of Rome. It accordingly seems probable that the *ius gentium* was worked out after the conquest of Sicily and simultaneously with the establishment of provincial government. When whole peoples were deprived of their previous political organization and converted into Roman subjects without receiving Roman citizenship, new law was for the first time needed. The protection of the Roman civil law could not be extended to these subjects by treaty, for they had no state organizations with which treaties could be made. These *dediticii*, however, could not be left without legal protection; and such protection was given them at home by the provincial governors and at Rome by the peregrine prætor. These magistrates had to make their own law, and they, or rather the jurists on their councils, gradually made the *ius gentium*. It is a result of Mr. Bryce's failure to accept this theory that he ascribes the establishment of the formulary procedure to direct legislation (p. 741). This system of procedure must, on the contrary, have been gradually worked out in the courts of the peregrine prætor and of the provincial governors; and

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the *Lex Aebutia*, according to this view, simply permitted the city prætor to hear informal pleadings and to send to the *iudices* such formulas as had long been used in the peregrine courts.

It is to be hoped that these studies will stimulate, in the United States, the study of Roman public law. In the government of the Roman Empire Mr. Bryce has found lessons useful to a British statesman. In the politics and public law of the last two centuries of the Roman Republic there is much that might be made useful to us.

MUNROE SMITH.

Les républiques parlementaires. Par ALBERT SOUBIES et ERNEST CARETTE. Paris, Ernest Flammarion, 1902. — viii, 195 pp.

As parliamentary republics this book designates France in Europe and Hayti, Santo Domingo, Venezuela and Chili in America. This classification is quite correct. The other European republic, Switzerland, is properly excluded from the category of parliamentary governments; but the reason given for it is not very clear. It is held that, the people themselves exercising a part of the functions of the government or of the assemblies, the system cannot be parliamentary, but is *républicain démocratique*. But on the other hand we have the fact that, in the first place, in the Swiss national government the people do not exercise the functions of the government, or of the assemblies, except in the form of an occasional referendum; and in the second place, if they did, it is difficult to see why that relation between legislative and executive which determines the parliamentary character might not exist.

This book appears to hold that the *régime républicain parlementaire* requires two things: first, that the people should exercise their powers through delegates; and, second, that the executive and the legislature should be harmonized (*solidarisés*) by means of a ministry. Without the first the system would be democratic instead of republican, and without the second it would be presidential instead of parliamentary. Taking this definition or description of the *régime républicain parlementaire* as correct, it is not easy to understand why Switzerland should not be excluded from the category of parliamentary republics on account of failing in the second requirement rather than in the first. It does not seem that the occasional reference of a legislative act to the voters, in accordance with a popular demand, is sufficient to make a system democratic instead of republican in the sense in which these two words are used in this book, or in any other

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sense. Soubies and Carette do not seem to have thought of considering the Swiss system from the point of view of the second requirement, and so they have dodged some very interesting questions, *viz.*, the questions of the character of the Swiss Directory and of the distinction between it and a ministry.

I refer to this weakness in the book with so much particularity because it reveals the character of the whole treatise. It is simply a compilation of the constitutional provisions and practices of the French Republic and a comparison of these with those of four other unimportant or less important states. In this the book has a certain value which must not be denied or ignored, but the reader must not expect to find political theory advanced in the slightest degree in the work, though the title would certainly justify such an expectation.

JOHN W. BURGESS.

Colonial Government. An introduction to the study of colonial institutions. By PAUL S. REINSCH. New York, The Macmillan Company, 1902. — x, 386 pp.

British Rule and Jurisdiction beyond the Seas. By the late SIR HENRY JENKYNS, K.C.B., with a preface by SIR COURTENAY ILBERT, K.C.S.I. Oxford, at the Clarendon Press, 1902. — xxiii, 300 pp.

Dix années de politique coloniale. By J. CHAILLEY-BERT. Paris, Librairie Armand Colin, 1902. — 171 pp.

These books, written in three different countries, are all calculated to throw much light upon the most pressing of the problems confronting our national government at the present time, *viz.*, the government of dependencies. Mr. Reinsch's book is professedly written with the purpose of reviewing "the modes of action and the institutions by which other nations have been for a long time attempting with varying results to solve similar problems." Mr. Reinsch believes it is "not safe to apply the precedents of American national development without careful selection" to the questions arising out of our recent territorial expansion. M. Chailley-Bert's work is largely devoted to exposing the mistakes committed by France in her recent colonial policy, while Sir Henry Jenkyns's book appears to have been written merely with the idea of giving a succinct and easily comprehended description of the methods which Great Britain is now using for the government of her vast empire.

Probably the last book, though the least interesting of the three under review, is the most valuable. For short as it is it contains

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a practically complete and up-to-date account of British colonial government. In addition to Sir Henry Jenkyns's treatment of the subject indicated in the title, there are three appendices, in which are given the text of some important acts of Parliament relative to the British dependencies, such as the British North America Act of 1867 and the Colonial Laws Validity Act of 1805, examples of governors' commissions and instructions, reports on important points of colonial law, *e.g.*, a Report on British Jurisdiction in Foreign States, by the late Mr. Hope Scott, Q.C., and an essay on the early constitutional history of the Australian colonies. Perhaps one of the most interesting portions of the book is the preface by Sir Courtenay Ilbert, the author of the standard book on the government of India. This preface has little to do, however, with the subject of the volume, but contains a most appreciative sketch of the life of Sir Henry Jenkyns, who for many years acted as parliamentary counsel. After reading this sketch one cannot fail to understand the reasons for the excellence in form of recent English legislation, or to regret that in this country we have not adopted somewhat the same methods for securing a result which becomes every day more and more to be desired.

Mr. Reinsch's book is divided into three parts, *viz.*, "Motives and Methods of Colonization"; "Forms of Colonial Government"; and "Institutions of Colonial Government." One cannot but regret that so much space — about one-fourth of the entire book — is devoted to the first part. For as the book does not profess to be more than an introduction to the study of colonial institutions, it would seem almost unnecessary to curtail the space devoted to the newer and more important phases of the colonial problem in order to thresh over again material which has already been subjected to so many threshings. Nevertheless, Mr. Reinsch has given us an interesting, timely and suggestive book. It is not and does not claim to be a systematic treatise, but is rather a book which treats of the more important colonial problems, with running references to the ways in which different countries have solved or attempted to solve them. It is also a valuable book because of the extensive bibliographical references appended to each chapter. These, as well as the text, show that Mr. Reinsch has devoted a great deal of time and thought to his work, which is remarkably painstaking and accurate. Perhaps the form of the book is responsible for conveying to the reader in one or two cases false impressions as to existing institutions. Thus one gets the impression on page 137 that the form of colonial government

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adopted by the Dutch in Java is a sort of protectorate, similar to that over the native states in India which have been permitted by the British to continue in existence. This of course is not the case. For apart from the *Vorstenlande*, as any one who has given any attention to the subject knows, the system of government in Java is what Mr. Reinsch calls "direct administration," although much use is made by the Dutch of members of the former native princely families as civil servants. Again, what is said of the French colonies hardly gives the proper impression as to the influence of the French legislature on the law in force there. In the majority of cases most of the French codes have been extended to the colonies by action of the chambers. But as has been intimated, these false impressions are due to the fact that Mr. Reinsch's book is not a systematic treatise — to the omissions made imperative by the form of the work, rather than to any lack of knowledge on the part of the author. Further, these slips, if slips they can be called, are few in number and cannot be said to be of great importance.

Mr. Chailley-Bert's book is a plea for the adoption by the French of a colonial policy based on facts rather than on theories. The facts which he contends should be taken into account are that France has few, if any, colonies, in the sense of districts settled or capable of being settled by the French people, but has rather possessions in most cases occupied by the black or yellow races. As a consequence, he claims that the prevalent policy, which has been one of assimilation, as it has been called, should be abandoned and that France should definitely recognize that her mission as a colonizing power should be merely to govern subject races and direct their industries in such a way as to secure the greatest advantages for both the inhabitants of the colonies and those of the mother country.

One cannot put down any of these three books without feeling how futile, how disastrous even, would be any attempt of the United States to treat the Filipinos as anything but a dependent race, which must for long years be denied any great share in the government of the islands apart from participating in local administration. Certainly the experience of France, England and Holland shows, on the one hand, that the grant to races similar in political capacity to the Filipinos of any great power of electing their officers other than local has been followed by most disastrous results, while, on the other hand, the adoption of what might seem to most Americans to be distinctly paternal and even despotic methods of government has,

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where that government has not been corrupt and has been reasonably regardful of native prejudices, been accompanied by incontestable advantages both to the governors and the governed.

F. J. GOODNOW.

The Development of Cabinet Government in England. By MARY TAYLOR BLAUVELT. New York, The Macmillan Company, 1902. — 300 pp.

The central thread in all constitutional history is to be found in the relations between the executive and the legislature. They are the two chief organs of government. Through the one the rights and claims of those who are responsible for the continuous administration of government find expression, while the other more or less clearly voices public opinion and the demands of society and makes them available in law. The greatest practical problem of government is to secure harmonious and progressive relations between these two organs; from its solution comes the due limitation of executive discretion on the one side and proper guarantees of civil liberty on the other. The system of cabinet government, particularly as developed in England, furnishes of course a classical example of one of the solutions of this question.

Although the history of cabinet government in England has for more than half a century attracted the attention of multitudes of writers, the subject is by no means exhausted. One of the reasons for this is to be found in the fact that most of the writers have fixed their attention upon the system as perfected after 1832, and also upon the relations between the cabinet and the Parliament: The forms of the executive out of which the cabinet emerged, its slow growth in the eighteenth century, the relations of its parts with one another and of the whole with the kingly office, have not received so much notice. The cabinet as it was under the aristocratic system of the eighteenth century still affords ample material for original treatment, as does the executive function in general.

Miss Blauvelt has performed a useful service by presenting in connected form the main facts in the history of cabinet government in England. In the preparation of the book she has used the correspondence, memoirs and biographies of the ministers concerned and the *Parliamentary History*. No attempt has been made to go beyond the printed and well-known sources relating to the subject. But these have been used with accuracy and judgment. More

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extended research would bring out more details and lead to a modification here and there; but the outlines of the picture would be left unchanged.

The great phases of the process are these. Soon after the Tudors made government by council a very prominent feature of their system it was found necessary, because of the size of the council, to divide it into committees. The policy of government by favorites, which was followed by the early Stuarts, hastened this process. Soon after the Restoration a relatively permanent committee of foreign affairs appeared, which was in reality a cabinet, though it did not possess unanimity and the king did not scruple to act without or even contrary to its advice. The committee was responsible to the king alone, though Parliament, by frequent impeachments, sought to establish its own control over it.

The second step in the development of cabinet government was the growth of parties. Upon their significance in this connection, as well as the survival of old traditions during the reigns of William III and Anne, Miss Blauvelt dwells at some length. The Whig Junto furnished some evidence of the influence of party to promote unity within the cabinet. Anne, however, gradually overcame this by her special insistence on the exclusive right to appoint and remove ministers.

While fully admitting the change which came into English affairs with the accession of the Hanoverians, the writer calls attention to the proofs of the survival of royal influence over the ministry in the time of Walpole, and shows that such influence reached its lowest point during the later years of George II. That result was due to the power of the Whig party, to the superiority of the leaders in the Commons over those in the Lords, and to the steady rise of the Commons, as a consequence of this, to a position of greater importance than the Lords. But throughout the period there was a great lack of unanimity in the ministries, Walpole being the only leader who was able in a measure to hold in check the tendency toward the development of factions.

When George III came to the throne the outlines of the cabinet system had been revealed; but it had never in practice reached perfection, and in fact could not do so with an unreformed Parliament. By throwing these facts into strong relief the writer is able to show that the position of George III was not so anomalous as some have made it appear. The succession of precedents for his course of action, leading back to Stuart times, was unbroken. His conduct was reactionary, but not unconstitutional. A rapid sketch at the

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close of the volume outlines the history of the cabinet until 1832, when party organization and reform finally established the supremacy of the House of Commons, and thus created the conditions under which alone a genuine system of cabinet government could be worked.

A reference, on page 12, to the act of 1539 on proclamations contains no statement of the very important limitations, contained in the statute itself, on the power of the king in the issue of such documents, and therefore gives a wrong impression. On page 25, 1641 should be the date given for the Grand Remonstrance.

HERBERT L. OSGOOD.

The Foundations of American Foreign Policy. By ALBERT BUSHNELL HART. New York, The Macmillan Company, 1901. — xi, 307 pp.

So far as the title of this book leads one to expect a systematic or complete account of our diplomatic history, it is misleading. The volume contains a series of more or less related essays dealing with some, but by no means with all of the "foundations" of our foreign policy. In justice to Professor Hart it should be added that in the preface he warns the reader what to expect.

> This book does not attempt to present a sketch of the diplomatic history of the United States, nor even to describe all the foundations which underlie the conscious or unconscious policy of the government toward other countries. . . . I mean simply to set down, in a form which may bring out the relations of one event to another, the actual history of some phases of our foreign relations.

A glance at the table of contents reveals the same thing, as well as the fact that the subjects of the essays have been chosen with special reference to the recent territorial expansion of the United States. All the essays have been previously published, the majority of them in one of the popular magazines; and although subjected to revision before publication, they still betray the fact of their separate origin.

The range of subjects treated is perhaps best indicated by the titles of the chapters, which are: (1) The United States as a World Power; (2) The Experience of the United States in Foreign Military Expeditions; (3) Boundary Controversies and Commissions; (4) A Century of Cuban Diplomacy; (5) Brother Jonathan's Colonies; (6) What the Founders of the Union thought concerning Territorial Problems; (7) The Monroe Doctrine and the Doctrine of Permanent Interest.

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The space at command will not permit a detailed review of the contents of each of the essays, or anything more than a brief statement of the point of view from which Professor Hart seems to have written. In the preface he disclaims any intention to be "an advocate of any particular policy," and, as we have seen, professes simply to relate "actual history." In spite of this disclaimer, even the most casual reader will discover that throughout the book the author is aiming, doubtless unconsciously, not merely at the setting forth of the actual facts but also at the establishing of certain interpretations of the facts when found; indeed, the emphasis is often upon the interpretation rather than upon the fact. To illustrate what is meant, near the end of one of the essays Professor Hart, from the facts set forth in the essay, draws the conclusion that "the annexation of territory and acceptance of protectorates which result from the Spanish War are not signs of a new policy, but the enlargement of a policy long pursued" (p. 167). To reach this conclusion, he seeks to establish, among others, the proposition that "the idea of national colonies is as old as the republic" and that the recently acquired territories, being nothing more than colonies, involve no new elements. To accomplish this result, he defines "the essential in the conception of a colony" as

> nothing more than a tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration instead of to the people of their own region (p. 134).

It is to be presumed that no one will quarrel with this as a definition of colonies in general, but when it is attempted, after showing that the United States has always had colonies as thus defined, to conclude that, since the Philippines are also within the definition, their acquisition does not signify the adoption by our country of any "new policy," some dissenting voices will perhaps be heard, and doubtless their reply to Professor Hart will be: There are different kinds of colonies; in the past, the territories of the United States have been acquired in the process of what may be called the natural national expansion of the United States upon this continent, and with the idea that the land thus acquired was, sooner or later, to be inhabited by a population of our own race, speaking our language, possessing similar political institutions, and ultimately to be admitted into full partnership in the Union as states; but in acquiring the Philippine Islands we have entered upon the stage of world-empire expansion,

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on the understanding that unless our experience shall be far different from that of other countries the new territory can never have any considerable population of Americans or Europeans, and can, therefore, never become an integral part of our Union.[1] The author himself states very clearly the attitude of such critics when he says (p. 138): "Up to the Spanish War, Brother Jonathan never looked in the face the prospect of a Union in which there should be permanent colonies." Surely the taking of the step which has brought Brother Jonathan face to face with such a prospect for the first time must be a "sign of a new policy" and not merely "the enlargement of a policy long pursued."

The reader will find, therefore, a statement not merely of the facts, but also of the conclusions which Professor Hart thinks should be drawn from the facts. This detracts neither from the interest nor from the value of the book — decidedly the opposite — whether one can agree with the author's conclusions or not.

The entire absence of any citations of authorities renders the book of less value to the student; but on the other hand the "working bibliography of American diplomacy" which occupies the last fifty pages will prove of great value. It does not purport to be in any way complete, or anything more than a "check-list of the more accessible books, with such brief comments as may show their value and bearing."

A minor inaccuracy, doubtless an oversight, is contained in the statement (p. 167) that Hawaii was acquired by treaty. Whatever view may be taken of the legality of the action of Congress in the matter, the joint resolution of the two houses which produced the desired result cannot be recognized as a treaty so long as our constitution remains as it is.

WALTER WHEELER COOK.

UNIVERSITY OF NEBRASKA.

The Constitutional History of the United States. By FRANCIS NEWTON THORPE. In three volumes, 1765–1895. Chicago, Callaghan & Company, 1901. — 595, 685, 718 pp.

There is room for a new constitutional history of the United States. It should consist of an adequate account of the framing of the original constitution and the several amendments; of the various

[1] On page 168 Professor Hart discusses the question of the future population of our new dependencies, and reaches the conclusion that "Hawaii alone is likely to become an American community."

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unsuccessful attempts at amendment; of the actual working of government under the constitution, as it has been developed in the political experience of the republic; of the meaning of the organic law, as decided by judicial interpretation or by the precedents of the other branches of the federal government; of the various schools of interpretation and of the sense in which they have read the constitution; of the influence of the federal fundamental law on the political thinking of the people. Politics, economics and political philosophy will appear in such a history only so far as they bear on the orderly development of the main theme.

In this sense Mr. Thorpe's three volumes are not a material addition to historical literature. His story of the making of the original constitution (found in Vol. I and the first book of Vol. II) is the familiar story, including Franklin's remark about the rising sun. The remainder of the second volume contains a sketch of our political history to the outbreak of the Civil War, and the third volume traces the steps which led to the adoption of the three war amendments.

The general method followed is that of quotation. There are numerous extracts from speeches, and still more numerous summaries of arguments in Congress, in conventions and elsewhere. This method has the advantage of giving a view of contemporary thought, and in a way of tracing the development of opinion. It requires a master hand, however, to use such materials without being swamped by them. In the present case it can hardly be said that the mass of citations has been thoroughly subordinated to the orderly development of historic sequence and to the working of cause and effect. The materials are abundant rather than well digested.

The sketch of politics connecting the first twelve amendments with the last three is not sufficiently critical. For example, the great debate between Webster and Hayne is not analyzed with the thoroughness which it deserves. Mr. Thorpe praises the eloquence of Hayne and the powerful logic of Webster in well-chosen words (II, 392–397). But this is what everybody does. Surely it is time now, when the passions of the great contest between the sections have burned out to cold ashes, to examine the grounds of both sides in the light, not of the event only, but of political science as we understand it to-day. Such critical study will show clearly that Hayne was in great part entirely correct, that in Webster's argument there was one fatal flaw and that each failed to comprehend some essential elements of the problem. If we supply the deficiencies, we shall see that each view is otherwise vital to an adequate understanding of our federal

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union. But the history of ante-bellum politics becomes luminous only under the light of such scientific criticism.

The history of the war amendments — especially of the fifteenth — is fragmentary without a study of their practical working. Mr. Thorpe seems to approve the congressional plan of reconstruction and of negro suffrage (III, 419). Is there, however, in the whole range of history a more grotesque blunder in political theory than that on which the extension of the suffrage to the freedmen was based, or a more ghastly failure than it became in practice? Abraham Lincoln had a far more rational idea as to the suffrage than was afterwards developed by the radical leaders in Congress. Writing to Governor Hahn of Louisiana in March, 1864, with reference to the subject of suffrage in the pending constitutional convention in that state, the President said: "I barely suggest, for your private consideration, whether some of the colored people may not be let in; as for instance, the very intelligent, and especially those who have fought so gallantly in our ranks" (III, 86). Had such prudent counsels prevailed later we might have been spared the stain on the national name left by the process of reconstruction. The thirteenth amendment embodied in the constitution an actual result of the Civil War. It expressed a living fact — and it was righteous. The suffrage amendments were artificial, and from their very nature were bound to be nugatory. This would plainly appear in a constitutional history which traced the organic law beyond its mere birth.

On the actual meaning and force of the constitution as time and experience have developed it, Mr. Thorpe gives us little light. A single chapter (Book IV, Chapter III) is devoted to the work of the Supreme Court under Marshall, and one chapter (Book VI, Chapter VII) touches some main decisions of the court from the time of the Civil War. But of the development of the federal government under the constitution — of the form which time has given to the presidential election and to the executive appointing power in its relation to Congress, of the relation of the Senate to treaties, of the cabinet, of congressional government — of all these and many more matters, which pertain not merely to the history of government, but quite as much to the history of the constitution as a living instrument, we have hardly a trace. The author's idea is to give in the main merely a history of the framing of the constitution. This is constitutional history, to be sure, but in an inadequate sense.

A comprehensive and thorough constitutional history of the United States, clear, complete in all its parts, well balanced, with adequate

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perspective, with material reduced to its proper proportion — a history, and not a mere collection of material for history — will be a valuable addition to the apparatus of scholarship.

THE UNIVERSITY OF CHICAGO. HARRY PRATT JUDSON.

The Mastery of the Pacific. By ARCHIBALD R. COLQUHOUN. New York, The Macmillan Company; London, Macmillan & Co., Ltd., 1902. — 440 pp.

This book has received high commendation and merits it. Within the compass of one volume it compresses a great amount of information, which the writer has gained, at first hand, by much travelling and careful observation. It contains a compend of the history of the countries of the Pacific and a description of lands and peoples; but this is all given for the sake of assisting the reader to form a judgment concerning the probable course and the outcome of the struggle for mastery which is impending. This is to be decided, the author thinks, by naval power, but not necessarily by actual naval warfare. The possession of large fleets may accomplish the purposes which would be pursued if they were brought into use. There is no concealment of the possibility that the ships may have to be used. Potential warfare usually accomplishes more than actual warfare; but this happens because, in certain contingencies, the actual fighting will begin, and these contingencies may occur.

Mr. Colquhoun not only does not conceal his personal views as to the policy which it is wise for a country like the United States to pursue, but freely expresses many opinions which the brevity of his work, in proportion to its great scope, makes it impossible to sustain by any very extended argument. On the ground that the facts as they stand constitute one comprehensive and conclusive argument, this is a reasonable course to pursue, and on this ground one will find it hard to justify a let-alone policy in Eastern affairs. Mr. Colquhoun not only thinks that America should pursue a policy of expansion but expresses the view that the United States will probably be the dominant factor in the East. Whether the power of this country will be used in alliance with that of Russia to create a gigantic "trust" which shall force all lesser powers to obey its will, or will be used more in accordance with traditional views and in a way that will harmonize with the policy of the maritime countries of Europe, is one of the chief undecided problems, though a reader of the book will incline toward the opinion that the latter of these courses will be

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adopted. Of the greatest importance, as the author thinks, is the preservation of the Chinese Empire and the placing of it, in a sense, under the tutelage of Japan; and this result seems to be attainable only by a concert of action on the part of America and western Europe. The importance of the subjects which the book treats, the brevity and clearness of the treatment and the exceptional qualifications which the author possesses for discussing these themes make Mr. Colquhoun's work one which a student of modern politics and economics will find of great value.

JOHN B. CLARK.

The Temperance Problem and Social Reform. By JOSEPH ROWNTREE and ARTHUR SHERWELL. Ninth Edition. Hodder and Stoughton. — 777 pp.

This is probably one of the most popular, as it is certainly one of the most important, works that have ever been produced on the temperance problem. It approaches the subject without any *a priori* bias, and seeks by a first-hand examination to make a positive contribution to a pressing social problem. Readers should be careful to purchase the latest edition, in which much fresh material has been added. The book as it stands is a compendium of accurate and valuable information on the whole problem of temperance reform as it exists in Europe, the United States and Canada.

The first two chapters are chiefly of insular interest, since they seek to point out the menace to England of the present situation with regard to intemperance. "We are face to face with this supreme necessity: either we must grapple with the forces that undermine our national strength, or be content to fall behind in the struggle for commercial supremacy" (p. 51). The economic argument advanced in these chapters is so singularly forceful and convincing, that it has produced a profound impression, and has already exerted a powerful influence on the thoughtful students of social problems in England.

This discussion leads up to an examination of different methods of dealing with the liquor problem, and here the volume becomes of immediate interest to all students of social questions. The first system examined is that of state prohibition, to which a large section of the volume is devoted. It is here that the latest edition of the book is especially valuable, since it contains the results of a first-hand investigation of prohibition as it exists in the state of Maine. It ought to be said, however, that this inquiry was made before the recent and energetic effort to suppress the saloons in

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Portland and other cities. Photographs and tables illustrate the text, and the whole discussion is thorough and convincing. The conclusion, to which most students of the temperance problem in this country had already arrived, is that the prohibition system is suited only to rural districts and small towns, and cannot be made to operate successfully in the larger towns and cities.

The next method which is examined is that of local option, and chiefly as it exists in the United States. This discussion is also exhaustive and minutely statistical, and is without doubt the most authoritative presentation of the subject to be found in print. The authors take up successively the different forms of the system as found in the different states of the Union. Their judgment is that it is a much more practicable plan than that of state prohibition. The system has stimulated temperance education and has secured the complete suppression of the saloon in such wide areas that it is a considerable contribution to the solution of the general problem in the United States. But it has failed, precisely where prohibition has failed, in the larger towns and cities. The no-license towns in Massachusetts are nearly always adjacent to license cities. The liquor problem remains unsolved for the urban centres.

The experiments of a state control of the liquor traffic, as illustrated by the spirit monopoly in Russia and the dispensary system in North Carolina, South Carolina and other states, are more briefly investigated. That these experiments are suggestive in eliminating the element of private profit from the retail sale of liquors; that they rob the saloon of much of its attractiveness, destroy in part its political power and decrease drunkenness, is not denied. But it is also evident that state control means that the liquor problem remains a political problem, and that the application of the profit to the reduction of the tax rate means a state, if not an individual, interest in the amount of the sales.

The nearest approach, in the minds of the authors, to a practical solution of the problem, is the Scandinavian method, known as the "company system." It is admitted (p. 504) that the system as operated in Sweden is defective in that it applies the profits to the tax rate; that in Norway sufficient provision is not made for counter attractions to the Samlag; and that the systems in both countries err in not including beer and wine within the scope of the companies. To this fact, and to the recent importation of impure spirits which do not come within the provisions of the law, the authors attribute the increase of drunkenness in recent years. On the other hand, the

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liquor dealer ceases forever to be a factor in politics, ceases to have a personal interest in the amount of his sales; gambling, treating and all accessory evils to the saloon are absolutely abolished, and the saloon ceases to be a centre of recreation and a social club.

The concluding portion of the volume is taken up with a constructive plan for the solution of the problem (pp. 598 ff.). This plan proceeds upon three general principles: First, the right of entirely prohibiting the traffic must be placed within the power of every locality; second, where a locality votes for the traffic, this shall be conducted either by the municipal council or through a company, as in Norway; third, the *whole* of the profits shall be handed over to a central state authority and shall be distributed to all localities, whether or not they permit the sale of liquors, to be used *solely* for the establishment and maintenance of recreative centres, the primary object of which shall be to counteract the influence of the drink traffic. This distribution is to be in ratio to the population, and not in ratio to the profits earned.

This program, whether practicable in all its details or not, doubtless includes the general principles which will underlie all future scientific temperance legislation. The authors appear to have little confidence in the experiments of the Bishop of Chester, Earl Grey and other reformers, who are seeking to evolve a reformed public-house. The dangers of associating amusement and recreation with the sale of intoxicants appear to them to outweigh the merits of the plan.

Elaborate appendices and a good index conclude a volume of extraordinary merit. It is to be hoped that in future editions the publishers will seek to issue it in a more compact form. No one can use a volume of such bulk with any degree of comfort.

RAYMOND CALKINS.

PITTSFIELD, MASS.

The Level of Social Motion. An Inquiry into the Future Conditions of Human Society. By MICHAEL A. LANE. New York, The Macmillan Company, 1902. — vii, 577 pp.

The point of view of this book is that the ultimate cause of social progress is change in the quantity, variety or distribution of wealth. All other cultural facts trail after economic facts. Nutrition and propagation are the primary forces in society. Moral ideas and sentiments relate to actions that check or further these basic functions. The diffusion of political power is in proportion to the diffusion of

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capital. Revolutions are the violent readjustments of the political to the economic state of the group.

The thesis of the book is that society tends toward a normal state in which the total product will be equally divided among all the producers. This is not proven, but is frankly assumed from an inspection of the social condition of honey-bees, in which equilibrium has been reached and progress has ceased. The norm once assumed, the law that is to explain "all the facts" "must be" a law expressing "the order of action by which a society is carried toward or from a state of economic equality." Human society can have "no other purpose than this very equalization toward which all social motions flow." Think of it! The central thesis of a portly volume hinges on six pages (246–251) about the social economy of the beehive! This is analogy with a vengeance.

The mode of progress toward this goal is the enlargement of the public ownership of capital. This takes place most rapidly in the wealthier societies, and especially in those in which wealth is most diffused. It will be brought about not by a conscious effort to control the social forces but by the forces themselves. The self-interest of the many will generate common ideas as to the right or wrong of each specific exercise of power by private capitalists. This moral flux will document itself in the union of government with larger and larger proportions of the total capital.

The reader who infers that this is an economic study with a collectivist sequel is far astray. The author's theses are wrapped up in a ponderous, pseudo-scientific social philosophy intended to lend an air of inevitableness to his predictions by ostentatiously formulating numerous "laws" of social behavior. Nothing is said of exploitation or injustice or the struggle of classes. Differences in capacity are overlooked. Qualitative distinctions between classes and occupations are not recognized. Everything hinges on the numerical distinction between the many and the few. In many passages the author shows himself sound and shrewd, but his philosophy as a whole impresses one as underdone. He has shown his constructive power in his facts and his originality in his mistakes.

The book abounds in crudities of style and thought. We read of the "unition" of gases; of "forces" "in motion"; of "social motion" "flowing"; of a "very populous" people; of a locality "remaining constantly fixed"; of "social facts" being "regarded as isolated ideas"; of the French Revolution being "dynamic," *i.e.*, violent; of successful statesmen being "appraised," *i.e.*, praised. We learn that

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China "is one of the most militant of existing states." The author chides scholars for speaking of the centuries from 500 A.D. to 1400 A.D. as "The Dark Ages." He speaks of "quantities of vital force" being "converted into the form of moral conceptions." We are cheered to learn that in a certain hypothetical social state "wealth would flow to those who could acquire it." We encounter the startling assertion that "the thought-life of the group" adjusts itself "to the civilizing forces set up in motion by the growing and convolving surroundings which it builds around itself and in which it exists."

Want of connected thinking shows itself in numerous inconsistencies. On page 55 we learn that the sanctity of human life has constantly increased, while on page 283 we are told to expect a comparative disregard for the sanctity of life and person "in communities more highly developed ethically than other communities." On page 318 it is stated that popular government is weak, while four pages farther on it is asserted that government is strong when political power is diffused. On page 270 the United States appears to be characterized by a "rapidly advancing equalization of wealth"; on page 313 we are told that the corporate method enables capitalists "to acquire ever enlarging shares" of wealth.

The notions of economic causation are such as Alice might have brought back from Wonderland. Immigration to this country proves the superiority of its institutions, not its abundance of unoccupied opportunities. To these same institutions and not to a century of free land is due the wide diffusion of wealth in the United States. The "standard of living" is confused with the "scale of living," so that we meet with the sapient remark: "It is wages really which determine the standard of living, not the reverse." The fact that men never get cloyed with wealth is attributed to a mysterious "mental capacity for ownership" which happens to increase at just the same rate as one's possessions. The growth of this capacity is termed "incrementation."

The book has no index, no bibliography, no footnotes, no citations of facts and no indication of contents beyond the thirty-seven words used in the titles of the twelve chapters.

THE UNIVERSITY OF NEBRASKA. EDWARD ALLSWORTH ROSS.

Economics as a Foundation for a Theory of Government. By WILLIAM M. COLEMAN. New York, 1901. — 88 pp.

In recent years it has often seemed that the study of the effects of economic influences upon social and political institutions, upon

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human character and culture, is destined to supplant the older economic science, which sought to analyze the phenomena of business life and to deduce certain norms for political action. One who believes that the latter branch of economics is no less essential than the former will read with sympathy Mr. Coleman's pamphlet, which, in spite of its somewhat misleading title, is wholly analytic in its nature.

A review of a condensed argument such as Mr. Coleman's can hardly be wholly just to the author, since much that is clear in the author's mind will inevitably be somewhat cloudy to the reader. This observation must be particularly applicable to the work under consideration. Frequently the reader encounters the phrase "as we proved," and turning to the alleged proof finds merely a statement, and that hardly clear.

The thesis which it is attempted to prove is "that in a static state commodities tend to exchange in the ratio of the respective amounts of labor required to produce them." In order to arrive at such a conclusion, it is of course necessary to dispose of the varying amounts of capital employed in production. This Mr. Coleman does by reducing capital to labor. "The fact that one man saves and acquires capital while another does not, is counted as an element of productive strength." The idea is explained by an illustration from a society in which all workers begin empty handed. Those who have the disposition both to work and to save will manifestly add more to the wealth of society than those who work, but consume their product. Mr. Coleman would say that they count for more labor. The author does not exactly disregard the fact that the labor "embodied" in capital receives a higher total reward than that which is paid with goods for consumption, since it produces a continuing income. By his definition, labor means productivity; accordingly, if it produces more, it *is* more.

Thus far all that need be said is that the writer has chosen to call "labor" what all other men call "labor and capital," and so arrives at results that differ merely in appearance from those of economists. But there is another element in price to be considered, namely, rent. How can Mr. Coleman reduce it to labor, as he would have to do to maintain his thesis? At first one suspects that he will apply his productivity measure to the "labor" applied to good land, and so discover that more is applied than on poor land. But he has a still more convenient method. "Broadly speaking, there are two methods of handling it [rent]: the first is

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to attempt to reduce it to some definite form, and ascertain the laws which govern it; the second is to ignore it except as a qualifying influence." The author decides to pursue the latter course. This should bring great relief to other economists who stumble upon contradictions that utterly destroy their labored systems. The way of escape is simple: ignore the obstacles as qualifying circumstances.

To his contempt for the marginal analysis may doubtless be ascribed the author's curious statement that, given equal talent and equal cost of training, the most successful steel manufacturer will always receive a much higher reward than the most successful musician, *because steel is more important than music.* In the same way, the most successful miller or baker should be the richest man of all.

The practical application of the theory to government is somewhat disappointing, since one would naturally expect something very new or very old — surprising, at any rate. But the gist of it is that government would best let underlying tendencies alone, employing its efforts to do away with the more superficial evils — sweatshops and the like. With this, of course, every one will agree.

Columbia University. Alvin S. Johnson.

Psychologie économique. Par G. Tarde. Paris, Félix Alcan, 1902. — 2 vols., 383, 449 pp.

M. Tarde's aim in this book is to extend to economic life the same principles of psychological interpretation on which he has based his system of general sociology. In economics, as in the broader field, Tarde holds that the essential things to be studied are the beliefs and desires of individuals and the relations, or "interpsychological" effects, of the beliefs and desires of one individual upon those of another. According as these beliefs and desires recur, oppose or harmonize and co-adapt themselves, we have three divisions of economics, not unfamiliar to readers of Tarde's other works, under the headings of "Economic Repetition," "Economic Opposition" and "Economic Adaptation." The traditional fourfold classification is entirely rejected.

In the section on Economic Repetition is discussed "Desire," "Belief" and "Needs" in their economic functioning, *i.e.*, as arising, as persisting or recurring, as spreading through the population from man to man or class to class, according to Tarde's well-known "laws

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of imitation." Economists will feel that the discussion often wanders far from their subject, and the same is true, in greater degree, of the chapters on "Labor" and "Money" which follow. Under "Capital" M. Tarde presents the thought that society's essential capital is psychological — the knowledge how to produce — or, in Tardian phrase, the sum of existing inventions. As regards this essential capital the material instruments of production are but auxiliary and derivative. Though, of course, unable to use this conception in discussing interest, M. Tarde applies it with some suggestiveness to social progress. The division of "Economic Opposition," opening the second volume, includes psychological conflicts (of desires and beliefs) within the individual, on which a theory of value is based, and conflicts between different individuals, involving crises, strikes, international rivalries, and competition in one form or another. "Economic Adaptation," finally, deals with the agents for mitigating conflict. Were not M. Tarde so much interested in historical surveys and interpretations, and were less of his discussion a retraversing of well-beaten ground, his treatment of collective *vs.* private property, of the regulation of exchange, of socialism *vs.* private association, might be more fresh and enlightening. There is indeed much suggestiveness in his treatment of invention as the most important agent of adaptation, and in the chapter on "Population" at the conclusion of the book.

In presenting a theory of value M. Tarde generalizes the term to make it the central notion of every form of social science. He offers a triad : truth-value, beauty-value and utility-value, each of which, in its own sphere, is fixed individually and socially by internal, psychological balancings of "desires" and "beliefs." Economic value (a special form of "utility-value") is based by Tarde on balancings of different *desires* in the minds of individuals. Though economists are not likely to take his theory, in its detail, so seriously as he might wish, nevertheless reference to his article in the *Revue philosophique* of 1881, and to his *Logique Sociale* of 1895, fairly demonstrates that M. Tarde did long ago and independently reach the conception of subjective value based on mental estimates instead of on objective considerations. Attention should also be directed to his discussion of "just price" (II, pp. 31 *et seq.*).

Throughout his book M. Tarde is frankly critical of economic science as "falsely exact" and as "unpsychological." But economists are not fairly represented in his references. French authors, it is true, make a good list, though one must ask why more use than

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mere mention was not made of Cournot and Walras. But in English the only names that appear are Adam Smith, Malthus, Ricardo, J. S. Mill, Macleod, Carey, Henry George and Ashley. M. Tarde laments that owing to ignorance of German he has not followed those German and Austrian "schools which set up the title of economic psychology: Schmoller, Wagner and Menger being their chiefs" (I, 142). In fact, the only German writers referred to are Marx, Bernstein, Kautsky, Bücher, Von Thünen, Roscher, Professor Lexis and — a passing reference — Böhm-Bawerk. This neglect of economic literature not only deprives M. Tarde's criticism of such weight as it might have, but is also the probable reason for his wasting so much energy on matters that are obsolete or trite. Thus it is argued at some length that money is not an ordinary commodity, that overproduction is due to subjective causes, that the "economic man" is a delusion. Considerable criticisms are directed against the Ricardian laws of rent and wages, against Malthus' law in its crude form and, in four or five different parts of the book, against the "law of supply and demand," interpreted in a bold objective sense. Gresham's law is attacked on the ground that the silver dollars of the United States, "although depreciated," do not drive out gold; monopoly is thought the natural and relatively beneficial outcome of competition, but the only cases discussed with more than mention are those of money and railroads. On the other hand, many points of vital interest are omitted. In spite of long discussion of landed property, nothing is heard of rent except scattered criticisms of Ricardo, Marx and Henry George. There is no mention of diminishing returns and no treatment of interest. Save for a few passages, profit, wages, and thus the whole problem of distribution, are left equally untouched. The classification adopted, moreover, apparently compels the splitting up of concrete matters, as protection, socialism, money, the effects of machines, *etc.*, among the three divisions of the book. And the most patient reader cannot but regret the many digressions in M. Tarde's work, the historical discussions and interpretations, the sections on "Rhythms" and "Cycles," the philosophical classifications and analogies. Despite M. Tarde's breadth of view and his suggestiveness upon certain points, even his admirers must question whether these volumes will greatly add to his reputation.

MICHAEL M. DAVIS, JR.

COLUMBIA UNIVERSITY.

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Financial Crises and Periods of Industrial and Commercial Depression. By THEODORE E. BURTON. New York, D. Appleton & Co., 1902. — 392 pp.

This is a general work upon economic crises. It includes two chapters of definitions, four on the causes of crises and the phenomena indicating their approach, one on preventives and remedies, one on the history of crises in the United States. To this there is added an appendix of selected opinions on the causes of crises and another containing statistical material. There is a large bibliography, a good index and a number of very helpful diagrams. The work is clearly written and the various parts of it are well balanced with reference to one another.

The first chapter gives the usual distinctions recognized by economists in the use of the words "panic," "crisis" and "depression." It might be suggested, as a matter concerning treatment merely, that in this chapter some confusion is produced by the introduction of numerous quotations, without a subsequent concise statement of conclusions.

In the second chapter general facts concerning crises and depressions are presented. The very reasonable conclusion is reached, regarding the recurrence of crises, that we have to do simply with tendencies, and that such a thing as a rigid periodicity does not exist. In this connection the succession of mental states through which a trading community passes between one crisis and the next, might have been discussed more at length. The stages of the crisis cycle are three, — a period of depression, one of development, and one of rapid expansion resulting in the crisis. The average duration of each of these periods is placed at from two to five years. Most crises fall in the autumn, and they visit with greatest severity the countries in which there is the most progress and expansion. France has been relatively free from severe disturbances. England has been a prominent sufferer. In comparing the business practice of England and the United States, to the advantage of the latter, the author illustrates the extreme practices which have led to crises in England by reference to the South Sea Bubble. It hardly seems apropos, at this time, to base comparisons upon data as remote as the Tulip Mania or the Dancing Mania or the South Sea Bubble. If the boldness with which great organizations have been created in the United States in recent years be taken into account, it seems difficult to convict English industry of greater venturesomeness than is displayed on this side of the water.

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The close of this chapter is devoted to the question, Do crises benefit the majority? The matter is introduced by calling attention to the belief in some quarters "that a community is never more prosperous than when a number of persons are complaining of hard times." It seems hardly credible that this absurdity is so widely entertained that it could not be left to refute itself. However, in connection with the subject, there are suggested some themes for economic research. It would be interesting to have a careful study with new data on the numerical proportion and relative spending power of those classes in the community having fixed incomes. So also a study would be welcome on the exact manner of propagation from one trade or industry to another of the effects of good or bad times, bringing out the order in which various commodities and services change to a new price level.

The causes of crises are reviewed in Chapter IV. The first part takes up the various forms of the derangement of capital, including direct loss or waste and indirect loss through a disturbance of the proper equilibrium in the capital equipment, whether caused by inadequate managerial ability or by the unavoidable wastes incident to progress. Eight theories of the origin of crises are discussed, of which four are varying statements of the problem of adjustment to new price levels. One is inclined to ask why J. S. Mill's theory of crisis which connects it with the increase of capital was not considered, or A. Wagner's theory of the influence of credit. The socialistic theory, based upon the relation of wages to the other factors in distribution, is not mentioned, though it stands in need of discussion in English, particularly since the appearance of Tugan-Baranowsky's *Studien zur Theorie und Geschichte der Handelskrisen in England.*

Chapters V and VI contain, according to the reviewer's opinion, the best work of the book and are models of their kind. They are devoted to a study of the indications of an approaching crisis, especially such indications as are given by the records of financial institutions. In order to indicate the scope of this very excellent original contribution to the subject of crisis, a brief analysis of Chapter VI may not be out of place.

1. Banks and Banking. — Sudden increase of loans. Decrease of deposits. Paper currency: if irredeemable — increase or decrease; if currency theory — decrease; if banking theory — increase; if greenbacks — no change. Increase of rate of interest. Decrease of specie, increase of loans. Decrease of bank reserves.

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2. Foreign Trade and Exchange. — (*a*) Merchandise: excess of imports (especially in debtor country); imports suddenly competing with domestic supply; imports of luxuries. (*b*) Gold: exports of gold for goods — at high prices; exports of gold and increase of discount rate; continuous and unexplained exportation of gold; sudden exportation of large quantities of gold; exports of gold replaced by inconvertible paper. (*c*) Any rate of exchange indicating excessive activity.

3. Prices and General Business Conditions. — Pronounced variations in business. Increase of business failures. Increase of speculation. Rise of prices. Continuous fall in prices of stocks.

4. Disturbed Conditions in Other Countries.

It is not too much to say that this chapter is one of the best pieces of work on the subject of crises that the literature of economics contains.

Chapter VII is devoted to preventives and remedies and may be passed without special remark. The eighth chapter, containing a brief history of crises and depressions in the United States, is a welcome contribution to the industrial history of this country.

The special literature of crises is now considerable, as the bibliography annexed to the work under review indicates. There is still needed, however, a study, preferably by a practical expert, of the technical problems arising in the management of banks and financial institutions during a crisis, with special reference to the prevention of panics or the amelioration of conditions during their existence. Further than this, it would seem as if we were now entitled to systematic works upon economics which shall give in their different parts adequate treatment to the complex phenomena of crises, fitting the subject properly into the body of economic thought and giving it such general recognition and balanced treatment as monographs and studies devoted exclusively to the subject cannot secure for it.

UNIVERSITY OF MICHIGAN. EDWARD D. JONES.

Principles of Political Economy, Vol. III. By J. SHIELD NICHOLSON. New York, The Macmillan Company, 1901. — 460 pp.

Professor Nicholson's *Principles of Political Economy* occupies a unique position in modern economic literature. In an era in which economic thinkers are ranked according to the value of their original contributions on special questions of economic theory or history or finance, Professor Nicholson has been content to undertake the somewhat neglected task of presenting a general survey of the whole field of economic thought.

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The plan of Professor Nicholson's work has been severely criticised, and from the scholar's point of view it is indeed open to serious objection. In retaining the general outline of Mill's work Professor Nicholson practically renounced the hope of creating a system which should synthesize the work done since the time of Mill. But it must be remembered that popular economic thinking is still greatly under the influence of Mill, and therefore the easiest way of presenting to the public the results of the latest historical and theoretical work is to cast them in the shape of a commentary upon Mill.

Vol. III is based upon Books IV and V of Mill's *Principles*. The first part, Book IV, discusses the nature and measure of economic progress; the second, Book V, is devoted to the economic functions of government. In his treatment of progress the author adopts a method quite the antithesis of Mill's, endeavoring to demonstrate general tendencies by historical facts instead of by deductions from arbitrary assumptions. He is too conservative, however, to present a clear definition of progress, and consequently he is frequently inclined to mistake history for progress. Thus it is hard to say why the sketch of the history of British coinage should be entitled "Progress and Money." As a discussion of progress, the book is unsatisfactory; but as a collection of historical material which is of more than insular interest, it has a considerable value.

Book V, like the corresponding book of Mill, is somewhat broader in its scope than its title would indicate. There is a full discussion of economic ideals and of the benefits and disadvantages of individualism; a fairly concise treatment of taxation and public expenditure; a restatement of the question of protection versus free trade; an essay on colonial policy and another on political economy and Christianity. Throughout, the treatment is sane and judicious, if somewhat diffuse. It would be difficult for any one to handle such an array of hackneyed topics without descending at times to the hopelessly commonplace; and from this vice the work before us is not altogether free. It is, moreover, somewhat surprising to find in a work on economics a discussion of the venerable question, "May a Christian become a soldier?" But perhaps economists are shirking their duty when they leave to others the entire border land between economics and practical ethics. In a work like Professor Nicholson's it would be folly to require a strict regard for the boundaries of economic science. The general reader desires a common-sense discussion of all problems into which wealth enters, and this Professor Nicholson has succeded in giving. ALVIN S. JOHNSON.

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BOOK NOTES.

READERS of William Hannibal Thomas's remarkable book, *The American Negro* (New York, The Macmillan Company, 1901), should read also Professor W. E. B. Du Bois's *The Philadelphia Negro* (New York, Ginn & Company, 1899). These two books, by negroes of ability and observation, paint two very different pictures of the race: the one gloomy and forbidding; the other hopeful, while pointing out many failures and difficulties yet to be overcome. Mr. Thomas's book has been much discussed, and by a large proportion of those who have entertained a rosy faith in the negro's prospects it has been severely condemned. It should be regarded, we think, as an interesting psychological fact. If the dark view it offers of negro intelligence and morals is even approximately true, that truth should be known. If it is all a lie, the liar is one of the most interesting personalities that have ever taken to authorship. Professor Du Bois's statistics are worthy of careful study, but they should not always be accepted until subjected to the analytical criticism which only students familiar with statistical detail are competent to make. They are a little weak in the pages devoted to showing that the negro is not so criminal as he is popularly represented to be.

An interesting and suggestive, if not quite a profound, study in social psychology is *La marche de l'humanité et les grands hommes*, by E. Bombard (Paris, V. Giard et E. Brière, 1900). The author shows the development of nations in civilization by means of a review of the great names of each period and region, and contends that existing social ills are a consequence of the long struggle between science and theology. The well-being of the race, he holds, demands attention to the development of a scientific morality; and the superiority of the white race, which is the complete demonstration of that proposition, is itself due to the cultivation of abstract science.

The reader who is in search of good vigorous thinking about men and things, by a man who does not care a scintilla whether he agrees with anybody else or not, and who is not afraid to exploit the resources of the English language in his militant antagonism to militancy and imperialism of every shade, should give himself up for an hour to John M. Robertson's *Modern Humanists* (London, Swan

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Sonnenschein & Co., 1901). The personalities dissected are Carlyle, J. S. Mill, Emerson, Matthew Arnold, Ruskin and Herbert Spencer. An epilogue, "Outlines of Social Reconstruction," is a bit of radicalism and common sense in due and entertaining proportions.

Vues contemporaines de sociologie et de morale sociale, by Henry Lagrésille (Paris, V. Giard et E. Brière, 1899), reviews current theories and discussions touching "The Fundamentals of Sociology," "Social Morality: the Individual and the Family," "The State and Civil Society," "Government," "Labor and Production" and "International Morality." The volume is popular and makes no noteworthy contribution to science.

The third volume of the *Transactions of the National Liberal Club, Political and Economic Circle*, edited by J. Levy (London, King, 1901), is of much the same character as its predecessors. The rather ill-assorted lot of essays on economic topics which makes up its contents exhibits all degrees of merit and all shades of opinion, from that of the extreme individualist to that of the socialist and the land nationalizer. Among the well-known writers are Messrs. MacLeod, Hewins, Wicksteed and Yves Guyot.

Mr. Sidney Buxton, whose substantial work on *Finance and Politics* is well known to readers on both sides of the Atlantic, has published a study on *Mr. Gladstone as Chancellor of the Exchequer* (London, Murray, 1901). The substance of the book, although only in outline, appeared in the *Fortnightly Review* in 1901. The essays deal with one aspect only of Mr. Gladstone's career and character, and the author disclaims any attempt to anticipate Mr. Morley's forthcoming biography of the great statesman. He succeeds, however, in giving a clear picture of Mr. Gladstone's work at the Exchequer, which all, whether friend or foe, now unite in praising as in every way exceptional.

Among the Russian economists who at the same time exercised a considerable influence in politics, N. K. Bunge occupies a prominent place. A number of his essays on the various phases of the history of economic theory have recently been collected under the title *Esquisses de littérature politico-économique* (Geneva, Kündig, 1898). Some of the essays date back almost half a century, and from the modern point of view there is but little in the volume to instruct the present-day student. The essays are interesting, however, as showing the opinions of a Russian who tried to combine economic liberalism with autocratic politics. A biographical notice and a bibliography of the author are prefixed to the work.

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The attractive and sympathetic lecture on *Arnold Toynbee* which was delivered a few years ago at Toynbee Hall by Lord Milner has recently been reprinted in a second edition (London, Arnold, 1901). It forms perhaps the most vivid picture of that remarkable personality that has yet appeared, and it will retain its place even after the publication of the larger biography which is still so sorely needed.

In *Volks- und Seewirthschaftsreden und Aufsätze* (Berlin, Mittler, two vols.) Professor Ernst von Halle has collected a number of essays on present-day problems of importance to his native country. The first volume, on German economic life at the close of the century, is occupied mainly with an account of the chief economic institutions of Germany. There is, however, also a substantial essay on the naval interests of Germany and a shorter one on the condition of economic theory. The second volume, entitled *Weltwirthschaftliche Aufgaben und weltpolitische Ziele*, deals with the wider international relations. The author not only discusses the relations between Germany and Holland and Germany and Asia, but takes up questions such as the development of Mexico, England's naval supremacy and the meaning of North-American imperialism. Dr. von Halle, as is to be expected, is an energetic upholder of the so-called "neomercantilism" and of the policy of colonial expansion. Although many of the essays are a little journalistic, Dr. von Halle discloses a substantial fund of acquaintance with fact and with economic principle. Many of his suggestions are fresh and interesting.

Laband's *Staatsrecht des deutschen Reichs* has recently appeared in a fourth revised edition, in four volumes (Tübingen und Leipzig, J. C. B. Mohr, 1901). The previous editions of this really great work have been reviewed at length in this QUARTERLY as they appeared, and we shall not repeat the encomiums which we have already bestowed upon it nor the criticisms to which we have subjected it. The historical introduction and the doctrinal part remain substantially unchanged in the new edition. The author does not seem to have learned any more history or to have changed his views of political science. He has, on the other hand, brought his account of the public law of the German Empire down to date in the most lucid and masterful way. It does not seem to us possible for a foreigner to acquire a thorough knowledge of this body of law without devoting himself earnestly and continuously to Professor Laband's great work.

The contribution of Professor E. G. Bourne to the Yale Bicentennial Publications is a collection of *Essays in Historical Criticism* (Scribners, 1901). This volume is an imposing monument to the

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depth and variety of the author's scholarship. It exhibits him with especial distinction as a destroyer of myths. An expanded version of his well-known attack on *The Legend of Marcus Whitman* is the longest essay (109 pp.) in the collection, and the shortest is a conclusive demonstration that a familiar passage in Seneca does not necessarily prove that the Roman moralist was aware of the existence of America. That Professor Bourne's genius is distinctly critical in character appears very clearly in the list of writers whom he convicts of errors, greater or less. The list includes, besides all the standard historians of the United States who have adopted the Whitman legend, Roger Bacon, Edward A. Freeman, Hermann E. von Holst and Henry Cabot Lodge. The topics on which he writes include "The Authorship of the Federalist" and several related subjects; "Prince Henry the Navigator"; "The Demarcation Line of Pope Alexander VI" and "The Proposed Absorption of Mexico in 1847–48." There are also appreciative essays on Ranke, Parkman and Froude.

The American Federal State, by R. L. Ashley (Macmillan, 1902), is a "text-book in civics for high schools and academies." It covers, in its closely packed 600 pages, more ground than could be covered satisfactorily by the most learned scholar and experienced teacher in the United States. Mr. Ashley makes no claim to such distinction. His work shows an adequate acquaintance with the best sources of information in the various subjects of history, public law, private law, economics, sociology, *etc.*, and a good sense of the end to be sought in handling the material; but the actual result seems too multitudinous to be very useful in the hands of the novice.

J. K. Hosmer's *Short History of the Mississippi Valley* (Houghton, Mifflin & Co., 1901) is a rambling collection of facts about the interior of the United States, covering the period from the pre-glacial age to the St. Louis Exposition in commemoration of the Louisiana Purchase. There is nothing dryly statistical about the book. It is entertaining throughout, permeated with the interest which the author so deeply feels in the region that gives him his text. If the unity of the treatment is somewhat difficult to discover at times, this must be ascribed to the nature of the task, which requires that a niche be found somewhere within the 230 small pages for Lassalle, Daniel "Boon," U. S. Grant and Booker T. Washington.

A Political Primer of New York City and State (1902), by Adele M. Fielde, published by the League for Political Education, is an admirable little handbook of information about administrative and

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electoral machinery. The facts are clearly stated; maps of the various electoral and administrative districts of the city are provided, and in general the seeker for information is enabled to find what he wants with a minimum of difficulty.

American Political History to the Death of Lincoln, by Viola A. Conklin (Henry Holt, 1901), is an expanded course of "parlor lectures." The author has been successful in making selections from standard works with good judgment.

It is a pleasure to record the appearance of the thirteenth volume, forming the beginning of the fourth series, of the *Recueil des Traités et Conventions, conclus par la Russie avec les Puissances Étrangères*, by Dr. F. de Martens, permanent member of the council of the Russian university of foreign affairs (St. Petersburg, 1902). The feature of copious historical notes, which characterizes this collection, is well illustrated in the present volume, in the preparation of which valuable materials have as usual been drawn from the unpublished Russian archives. As of special interest to American readers, we may particularly advert to the editor's treatment of the subject of the Armed Neutrality, and of the negotiations relating to the conclusion of the treaties of peace of September, 1783.

Professor F. W. Blackmar's *Life of Charles Robinson* (Topeka, 1902) may be divided into two parts, rather unequal in size. The first ten chapters relate primarily to Kansas history as a whole, with Dr. Robinson's contributions woven in with those of the other prominent characters. The last two, on the other hand, are of the nature of biography. The first part is full of interesting and instructive facts, stated with clearness and correctness, though their sequence is not as firmly fixed as one could desire. One who already knows Kansas history fairly well will get great benefit out of Professor Blackmar's narrative, but one who does not know it at all can begin his reading better in other presentations of it. In the last two chapters Robinson's character traits are distinctly revealed. One sees here a man who had none of the art of attributing to himself the credit for what many other men did, and very little of the disposition to insist upon receiving the credit for what he did himself; a man whose whole habit of thought was objective and who never appeared, in anything he undertook, to have posed to himself the question, "What is there in this for me?" a man of far-reaching insight, impartial judgment, generous feelings, steady nerve and unquestionable courage; a man of large and profitable experience, of great administrative ability and of practical business ability,—

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in a word, a statesman, educator and philanthropist of a very high order. There is no question that, as time creates the proper perspective for Kansas history, the character of Robinson will assume larger and larger proportions, while the parts played by noisy men like Lane and Brown and the others will at least lose the importance heretofore attached to them, if they are not largely forgotten or ignored. Professor Blackmar's book is a solid contribution to the final production of this much-to-be-desired result.

Miss E. M. Leonard's *Early History of English Poor Relief* (Cambridge, University Press, 1900) throws much light upon the origin and success of the famous statute of Elizabeth. The author proves that in the sixteenth century, as in the nineteenth, the cities, and especially London, were pioneers in improving the system of poor relief and that successive statutes were based then, as later, largely upon municipal experience. Thus the cities forbade begging and provided for the collection of common funds for the relief of the poor before Parliament did so; they imposed poor rates before Parliament resorted to taxation for this purpose, and they made "settlement" the basis of relief long before the Act of Settlement was passed. Even more significant is the information Miss Leonard has collected in reference to the part the privy council of Charles I played in the enforcement of the 43d of Elizabeth. She traces in detail the steps by which that body gradually assumed direction of the whole system of poor relief and gives abundant evidence in support of her thesis that "from 1631 to 1640 we had more poor relief in England than we ever had before or since." The book deserves special commendation for its unvarying reliance on contemporary sources in its statements of fact and for its recognition of the truth that administration, rather than legislation, determines the character of a system of poor relief. The author has been tireless in her efforts to get behind the often misleading phraseology of statutes and to discover how the destitute were actually dealt with during this period of English history. Even should some of her conclusions prove overdrawn, the materials she has collected will be of permanent value and make her book an indispensable supplement to Nicholls's useful but somewhat superficial *History of the English Poor Law.*

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